Calendar No. 2629

84TH CONGRESS, 2d Session } SENATE { REPORT No. 2587

GOVERNING THE CONTROL, APPROPRIATION, USE, AND DISTRIBUTION OF WATER

JULY 17 (legislative day, JULY 16), 1956.—Ordered to be printed

Mr. BARRETT, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

together with

INDIVIDUAL VIEWS

[To accompany S. 863]

The Senate Committee on Interior and Insular Affairs, to whom was referred the bill (S. 863) to govern the control, appropriation, use, and distribution of water, having considered the same, report favorably thereon with an amendment in the nature of a substitute, and with the recommendation that the bill as amended do pass.

The amendment in the nature of a substitute is as follows:

That this Act may be cited as the "Western Water Rights Settlement Act of 1956".

SEC. 2. In the arid and semiarid regions west of the ninety-eighth meridian rights to the use of water are property rights which are fundamental to the economic life and well-being of the American people. In view of the fact that the needs for water do not coincide with the location or the natural flow of the available sources of supply, it is recognized that rights to impound and divert water and to apply it to beneficial purposes, frequently at places substantial distances from the points of diversion or storage, are matters of paramount importance To promote the beneficial application of the available water supplies in these regions it is and has been necessary that public and nonpublic entities be encouraged to make investments in water resource developments. Security of right to the use of water for beneficial purposes is essential to such encouragement, and regulating the acquisition of water rights must be orderly and with full regard to the need for stability of such rights if public and private investments in water resource developments are to continue on a sound basis. Neither the proprietorship functions of the United States derived from the ownership of the public lands nor the exercise of its powers relating to interstate commerce and the general welfare should be permitted unduly to interfere with prior rights to the use of water or the orderly acquisition of such rights in the future. For more than ninety years this policy has been recognized by the Congress and the acquisition of such rights under State law has been encouraged and repeatedly protected by Federal legislation. Under this policy these States have been able to make their

proper contribution to the strength of the Union, and twenty-seven million acres of arid and semiarid land have been brought under irrigation, of which only one-fourth are a result of federally assisted projects. It has not been and is not the intention of the Congress that Federal agencies, in pursuing their programs for water resources development in these arid and semiarid areas, shall have any prerogative to preempt the field or to cast clouds on the security of prior rights under State law acquired for beneficial purposes. Because of the fact that previous Acts of Congress have been and may be interpreted with respect to these States so as to cast clouds on such prior rights and to interfere with the future orderly development of water resources in accordance with the foregoing declaration, it is the purpose of this Act: (1) to remove any such clouds; (2) to provide for the future acquisition of unappropriated ground and surface waters, navigable and nonnavigable, in compliance with State laws; and (3) to provide adequate protections of the Federal interests to the end that the Federal Government may perform its functions in a manner consistent with the foregoing purposes.

SEC. 3. For the purposes of this Act—

(a) "Federal agency" means the executive departments and independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States;

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of any Federal agency in an official capacity, whether temporarily or otherwise.

SEC. 4. This Act shall apply only to States lying wholly or in part west of the ninety-eighth meridian.

SEC. 5. In the use of ground and surface water for any purpose in connection with Federal programs, projects, or activities no Federal agency or employee of the Government shall interfere with the exercise of any right to the use of water for the beneficial purposes theretofore acquired under and recognized by State custom or law except when authorized by Federal law and upon payment of just compensation therefor: *Provided*, That the provisions of this Act shall not be construed to preclude, when authorized by Federal law, the acquisition by or for the United States of such rights by purchase, exchange, gift, or eminent domain, or by any manner of acquisition recognized under State law.

SEC. 6. Subject to existing rights, all unappropriated navigable and nonnavigable ground and surface waters are reserved for appropriation and use of the public pursuant to State law, and rights to the use of such waters for beneficial purposes shall be acquired under State laws relating to the appropriation, control, use, and distribution of such waters. Federal agencies and permittees, licensees, and employees of the Government, in the use of water for any purpose in connection with Federal programs, projects, activities, licenses, or permits, shall acquire rights to the use thereof in conformity with State laws and procedures relating to the control, appropriation, use, or distribution of such water: *Provided*, That nothing in this Act shall be construed to require the acquisition by the United States of such rights in the storage and release of water by the United States solely for the prevention of floods: *Provided further*, That the United States may acquire such rights, when authorized under Federal law, by purchase, exchange, gift, or eminent domain: *Provided further*, That no right hereafter acquired under State law shall be enforceable against the United States if such right would be enforceable against the United States only because of a State law or custom which discriminates against the United States or denies the United States the opportunity to acquire such rights on terms and conditions at least as favorable as those under which any other entity or person may acquire such rights: *And provided further*, That nothing in this Act shall be construed to permit any person or entity to acquire the right to store or divert waters in any national park or monument unless otherwise authorized by Act of Congress.

SEC. 7. Nothing in this Act shall be construed to impair or diminish the rights of any State or the United States to waters under any interstate compact or judicial decree, or to permit appropriations of water under State law which interfere with the fulfillment of treaty obligations of the United States, or to affect, impair or diminish any existing water rights in Indians, Indian tribes, or persons claiming under or through them or any Federal reclamation project heretofore authorized by the United States.

SEC. 8. Subject to existing rights the use for navigation of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial use thereof, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

SEC. 9. All withdrawals and reservations of public land heretofore or hereafter made by the United States shall be deemed made without prejudice to the beneficial use of water originating in or flowing across such lands, theretofore or thereafter initiated under the laws of the States in which such lands are situated.

SEC. 10. The provisions of this Act shall not be construed as repealing or affecting any of the provisions of section 8 of the Reclamation Act of 1902, but shall be construed as being supplementary thereto.

SEC. 11. Any license or permit issued under the Federal Power Act for the construction of any project works (as defined in such Act), which would impound or divert or interrupt the flow of nonnavigable and intrastate waters, is hereby suspended if such construction has not on the date of enactment of this Act reached a stage of completion which effects such impounding, diversion, or interruption. Any suspension under the provisions of this Act may be terminated by the Federal Power Commission upon a determination by the Commission that all requirements of this Act have been substantially complied with by the licensee or permittee whose license or permit is suspended.

SEC. 12. If any provision of this Act or the application of such provision to any person, organization, or circumstance shall be held invalid, the remainder of the Act and the application of such provision to persons, organizations, or circumstances other than those as to which it is held invalid shall not be affected thereby.

Amend the title so as to read:

A bill to affirm and recognize the water laws of the States lying wholly or partly west of the 98th meridian.

EXPLANATION OF THE BILL

Section 1

The act would be cited as the "Western Water Rights Settlement Act of 1956."

Section 2

This section declares the policy and purpose of the act. The purpose is stated to be threefold: First, to remove clouds on water rights previously vested under the laws of the 17 Western States; second, to provide for the future acquisition under State law of rights to the use of all unappropriated waters; third, to provide adequate protection for Federal interests in the use and development of such waters.

Section 3

Appropriate definitions are stated in this section.

Section 4

This act applies only in the States of Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

Section 5

This section requires payment of just compensation and lawful authorization in any interference by Federal agencies or employees with rights to the use of water vested under State law. The proviso makes it clear that the section is not intended to prevent any lawfully authorized acquisition, whether by eminent domain or otherwise.

Section 6

All unappropriated waters, whether ground or surface, nonnavigable or navigable, are declared available for appropriation under State laws. Federal agencies and permittees, licensees, and employees of the Federal Government are required to acquire property rights to

the use of water under State law in carrying out Federal water uses. All existing rights of third parties under State or Federal law would be protected (including Indian rights).

The first proviso excepts the storage and release of water solely for flood prevention from compliance with the foregoing property right requirement.

The second proviso makes it clear that the Congress does not intend to interfere with lawful powers to acquire water rights by eminent domain, purchase, exchange, or gift.

The third proviso denies enforcement against the United States of any right thereafter acquired which would be enforceable only because of a State law which discriminates against the United States in the acquisition of water rights.

The fourth proviso makes it clear that this act is not intended to change the status quo so as to permit diversions or water storage in any national park or monument.

Section 7

Nothing in this act is to be construed to interfere with (1) rights of any State under court decree or interstate compact; (2) treaty obligations of the United States; or (3) existing Indian rights.

Section 8

Navigation uses are made subordinate to consumptive uses of water in these States.

Section 9

The reservation or withdrawal of public lands from entry alone shall not affect rights to the use of water theretofore or thereafter acquired under State law.

Section 10

This section makes it clear that the provisions of this act are supplementary to the reclamation laws.

Section 11

This section suspends construction of uncompleted project works on nonnavigable intrastate waters under a Federal power license or permit pending a determination by the Federal Power Commission that there has been substantial compliance with the requirements of this act. This section is referred to in Federal agency reports as the Neuberger amendment.

Section 12

This is the typical separability clause.

PURPOSE OF THE BILL

This bill, as amended, would reaffirm the long-standing congressional policy protecting the integrity of State water law in the 17 Western States. To this end it would require payment of just compensation whenever Federal activities interfere with property rights to the use of water which are established under State law. Subject to existing rights of third parties all unappropriated waters would be made available for appropriation and use of the public upon compliance with provisions of applicable State law. S. 863 also would confirm the previous statutory policy requiring Federal agencies and

others claiming through the United States to acquire rights to the use of water pursuant to State law in connection with Federal programs, projects, activities, licenses, or permits. This latter requirement would be subject to a number of provisions safeguarding Federal water-development functions.

HISTORY OF WESTERN WATER LAW

The 17 Western States comprise an area of 1,830,000 square miles, constituting 60 percent of the area of continental United States. With a few minor exceptions this area is arid or semiarid, and the use of water for agricultural purposes, by both native and white peoples, existed prior to the existence of our Nation. The West was acquired by the United States by purchase from France of the Province of Louisiana (1803), by the annexation of Texas (1845), by the Oregon Territory Treaty (1846), by the treaty of Guadalupe-Hidalgo (1848), and by the Gadsden Purchase (1853).

With the exceptions of Texas and California, which were admitted to the Union in 1845 and 1850, respectively, this region was organized into Territories prior to the admission of the States. Mining and agricultural uses of water that came about were necessarily protected by local customs both before and after acquisition by the United States, and, also, before the admissions of these States.

Water law in the Eastern States is, for the most part, based upon the common law doctrine of riparian rights. Under this doctrine rights to use flowing waters are appurtenant to the ownership of riparian lands, and each such owner has an obligation to return water used to the stream, substantially undiminished in quality or quantity, for the benefit of downstream riparians. Only very limited consumptive uses are permitted. As against the rights of others, riparians may not use water on nonriparian lands. Furthermore, upper riparians do not lose their rights through nonuse even though downstream riparians may have put the water to beneficial use for many years. These results were satisfactory at a time when and in a humid region where water could be assumed plentiful for all human needs.

All of these Western States are totally or partially arid or semiarid. The land areas of these States outstrip the available water supply. Consequently, the adoption of water law principles by these States is a matter of fundamental importance to their development. Control over the use of water in those States can be a matter of life and death to whole communities, and, in the interests of sound public policy, the rights to the use of water must be as free from uncertainty as our laws can make them.

The history of western water law commenced with the discovery of gold on public lands in the 19th century. These lands at that time were not open to occupation and settlement under Federal law, yet settlers went into these areas and established local rules and regulations to provide peace and order. Even before Federal recognition of these rules and customs, State and Territorial legislatures and courts enforced and implemented them.

Because of the arid nature of the region it was frequently necessary to divert water from streams and lakes for use in the mining localities. Under local laws and customs water rights were based upon appropriation of water, priority in time, and beneficial use. In some States,

such as California, the principle of prior appropriation was superimposed on the riparian system. In others, such as Wyoming and Colorado, prior appropriation was adopted as the exclusive principle of water law.

As was pointed out above, the water supply in the West is extremely inadequate when compared with the need for water for the acreages of land that are available for development for agriculture, or for municipal purposes and industrial purposes. Consequently, the practice and the policy in the West has been to permit the free movement of water from the streams in which the water is found to those areas which are deemed by the people living on the land to be most suitable for development.

The traditional common-law rule of water rights is known as a riparian doctrine in which the right to the use of water is part and parcel of the ownership of the land. There have been distinct limitations on the use of water under the riparian doctrine, which is common in the Eastern States, and which, in modified form, applies to some of the 17 Western States which would be affected by this bill.

All of the 17 Western States have adopted the doctrine of appropriation. In those States having traditional common-law rules concerning riparian rights, or a modified form thereof, the doctrine of appropriation has been superimposed on the common-law system of riparian right.

The essence of a water right, of course, and the value of a water right, depends on the right of the owner to require the delivery of water by those who lie above him on the stream in quantities necessary for his use. Likewise, the value of his right depends very greatly on the right that he has to deplete the flow of the stream at his proposed place of use so as to thereby diminish the flow that would be available to those owners below.

The riparian doctrine restricts the use of water to the watershed of the stream, in the first place, and secondly, restricts the quantities of water which can be consumed or beneficially used in a consumptive manner. Hence, it becomes very apparent that the riparian system would not work in the Western States, where irrigation is the very lifeblood of their agricultural economy and the necessity exists to take that water as far as several hundred miles from the point of diversion.

Water is so precious to these States that public policy dictated a rule of law under which water rights could be lost for nonuse and acquired only by beneficial use. These principles were part of the common law in the Western Territories and States, just as the traditional riparian doctrine was part of the common law in Eastern Territories before they were admitted to the Union. If we are to say truly that the arid and semiarid States of the West are equal members of the Union, then we must concede to them and their inhabitants the same sovereign rights to determine what their common-law principles should be as are accorded to the Eastern States.

In *Kansas* v. *Colorado* (306 U. S. 46, at 94) the Supreme Court said:

> It (a State) may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State.

In *Clark* v. *Nash* (198 U. S. 361, at 370) the western law limiting the rights of riparian landowners to the use of water was explicitly recognized when the Court said:

> The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil by means of irrigation. This court must recognize the difference of climate and soil which renders necessary these different laws in the States so situated.

Of the 17 Western States, 9 have declared by their constitutions ownership or control over the appropriation of waters for beneficial purposes, while 8 States have done so by statutes. Congress admitted these States without reservations indicating any intent to claim Federal control over rights to the use of their water resources. In the first category, and in the second, with dates of admission, the States are:

Claiming ownership or control of waters of the State

In Constitution	By Statute
Texas (1845)	Oregon (1859)
California (1850)	Kansas (1861)
Nebraska (1867)	Nevada (1864)
Colorado (1876)	South Dakota (1889)
North Dakota (1889)	Montana (1889)
Washington (1889)	Utah (1896)
Idaho (1890)	Oklahoma (1906)
Wyoming (1890)	Arizona (1912)
New Mexico (1912)	

CONGRESSIONAL CONFIRMATION OF WESTERN WATER RIGHTS

The Congress soon recognized the necessity of the appropriative doctrine to the populating of the western region and the development of its resources. As early as 1866 Congress confirmed existing appropriations, and a series of later acts encouraged future appropriations of water and provided for canal and reservoir rights of way on federally owned land.

Since the United States, through cession, was the owner of the vast public lands in these Western States, and territories, its potential claims, riparian or otherwise, to water rights as appurtenances to its land ownership constituted a definite hazard to the rights of early settlers who had diverted water, conducted it long distances, and put it to beneficial use for mining and agricultural purposes. Desiring to promote the development of the West the Congress enacted a series of acts opening lands to settlement for mining and agricultural purposes. By the act of July 26, 1866 (14 Stat. 251) the Congress confirmed water rights which had accrued by priority of possession and

"are recognized and acknowledged by local customs, laws, and the decisions of courts * * *." These possessory rights were further protected by the act of July 9, 1870 (16 Stat. 217) which provided the public land patents "shall be subject to any vested and accrued water rights."

These statutes were followed by the Desert Land Act of 1877 (19 Stat. 377) which allowed the entry and reclamation through irrigation of desert lands in a western area which now includes the States of California, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, North and South Dakota (Colorado was added later). This act contains a proviso that an entryman's right to use water would depend upon prior appropriation for irrigation and that:

> * * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights (43 U. S. C. 321).

The Supreme Court has ruled that the net effect of these statutes was to confirm the validity of appropriative rights to the use of nonnavigable waters theretofore or thereafter acquired under State law. In this connection the Court has said:

> What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain become publici juris, subject to the plenary control of the designated States, including those since created out of the Territories named, with the right to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain (*California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, at 163–164).

As Federal programs for resource development and management have come into existence, Congress repeatedly has indicated its clear intent that such programs shall not conflict or interfere with State water laws.

The requirement of conformity to State law was included in President Theodore Roosevelt's original message to the Congress proposing the Reclamation Act of 1902, in which he said:

> There remain, however, vast areas of public land which can be made available for homestead settlement, but only by reservoirs and mainline canals impracticable for private enterprise. These irrigation works should be built by the National Government. The lands reclaimed by them should be reserved by the Government for actual settlers, and the cost of construction should so far as possible be repaid by the land reclaimed. *The distribution of water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights.* The policy of the Na-

tional Government should be to aid irrigation in the several States and Territories in such manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation. [Italic added.]

The Reclamation Act of 1902 (32 Stat. 388) provided the basis for direct action by the Federal Government in the construction and operation of irrigation projects. From the very beginning Congress declared that this program must be carried out in conformity with State water law. Section 8 of that act provides:

> SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

As other Federal programs for resource management have been authorized, a number of provisions have been enacted, varying in scope and detail, which were manifestly designed to avoid conflict between Federal activities and local water law principles. Among these are the following:

Act of June 4, 1897 (30 Stat. 36), relating to forest reservations.

Sections 9 (b) and 27 of the Federal Power Act of 1920 (41 Stat. 1068, 1077).

Section 3 of the Taylor Grazing Act of 1934 (48 Stat. 1270).

Section 18 of the Boulder Canyon Project Act (45 Stat. 1057).

Sections 3 (b) and 10 of the Water Conservation Act of August 11, 1939, as amended by the act of October 14, 1940 (54 Stat. 1121, 1125).

Section 1 of the Flood Control Act of February 22, 1944 (58 Stat. 887).

Reservation (c) to the Mexican Water Treaty (59 Stat. 1219).

The National Parks Act of August 7, 1946 (60 Stat. 885).

Section 208 of the act of July 10, 1952 (66 Stat. 560).

Section 3 (e) of the Submerged Lands Act of May 22, 1953 (67 Stat. 31).

Subsection 3 (c) of the act of July 28, 1954 (68 Stat. 577).

Section 4 of the act of August 4, 1954 (68 Stat. 667).

Section 4 (b) of the act of July 23, 1955 (69 Stat. 368).

(The principal constitutional and statutory provisions are appended at the end of this report.)

The basic purpose of S. 863 is to reaffirm in one general statutory enactment the uniform policy of these laws.

90004°—57 S. Rept., 84–2, vol. 4——122

NATIONAL FOREST ADMINISTRATION ACT OF 1897

Typical of Federal agency compliance with State laws concerning water rights is the experience of the Forest Service of the Department of Agriculture. The act of June 4, 1897 (30 Stat. 34), as amended and supplemented, authorizing the Secretary of Agriculture to administer the national forests, contains the following provision concerning the right of the general public to use waters within the national forests under State laws:

> All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder (16 U. S. C. 481).

There have never been any laws of the United States establishing detailed procedures for acquiring rights to the use of these waters, and for nearly 50 years the above-quoted provision has been administratively interpreted by the Department of Agriculture as authorizing the general public to appropriate waters within the national forests under State laws. This administrative interpretation has been supported by an unbroken line of formal opinions by the General Counsel (formerly Solicitor) of the Department of Agriculture beginning as far back as 1910. During this entire time regulations and instructions of the Secretary of Agriculture for the use of the national forests have uniformly recognized the right of the general public to make appropriations of waters within the national forests under State laws.

The Department of Agriculture, having recognized through the years the right of the general public to appropriate waters within the national forests under State laws, has at the same time been aware of the necessity of protecting its existing and contemplated uses of waters within the national forests that are essential to the proper administration of the forests. The effective way in which these uses can be protected against appropriations made by the general public is for the Department of Agriculture also to make appropriations for such uses in accordance with State laws. In protecting these uses, the Department of Agriculture through the years has acquired by appropriation under State laws many hundreds of rights to the use of waters within the national forests which are needed for the protection. utilization, and administration of the forests, and is continuing to acquire these rights under State laws at the present time.

The Attorneys General of the United States have been fully aware over the years of the administrative practice of the Department of Agriculture to make appropriations of waters within the national forests under State laws. The existence of this administrative practice has been brought to the attention of the Attorneys General time after time through requests made by the Department of Agriculture for the Attorneys General to protect the interests of the Forest Service in adjudication proceedings in State courts involving water rights acquired by the Forest Service under State laws for the administration of the national forests. The Attorneys General have time and again, in response to these requests, taken appropriate action to

protect the interests of the Forest Service in these adjudication proceedings.

Congress also has been fully cognizant of the long established administrative practice of the Department of Agriculture concerning its authority to make appropriations of waters within the national forests under State laws. Beginning with the Department of Agriculture Appropriation Act of June 4, 1936 (49 Stat. 1421), each annual appropriation act down to the present time has included a provision authorizing the Forest Service to make payment of the fees incident to the filing of applications under State laws and procedures for the appropriation by the Forest Service of waters within the national forests. Since 1944 the appropriations for expenditure by the Forest Service of such sums as may be necessary for the investigation and establishment of water rights acquired under State laws needed in connection with the administration and public use of the national forests have been based on section 213 of the Department of Agriculture Organic Act of 1944 (58 Stat. 734).

INDIAN WATER RIGHTS

Congress is fully cognizant of the problem of Indian water rights and does not intend to deprive the Indians of the rights to beneficial use of water. In fact, this legislation not only protects all "existing water rights" generally, it also specifically provides in section 7 that nothing in the act shall be construed to affect, impair, or diminish such rights belonging to Indians, Indian tribes, or persons claiming under or through them. Thus it is intended that existing rights, including those impliedly reserved under the doctrine of *Winters* v. *U. S.* (207 U. S. 564 (1908)) shall be fully protected.

NEED FOR LEGISLATION

This bill deals with water rights, not project works. Its main purposes, as stated in section 2, are to lay at rest all claims and bases for claims that Federal reclamation and water-right laws are merely directory, and to require that all Federal agencies, instrumentalities, and officers shall comply with the mandates of Congress respecting water rights in the West.

Under these statutes, which are based on comity between the Federal and State governments in regulating the acquisition of rights to the use of water, thriving communities have been established in States once described as the "Great American Desert." Today approximately 27 million acres are irrigated. Of this total about 7 million are the result of Federal projects, and the rest have been subjected to irrigation through local efforts based upon presumed security of property rights to the use of water.

Until now, at least with respect to nonnavigable waters, this presumed security of right—so necessary to encourage local water development—has seemed well-founded. Federal legislation, particularly the Desert Land Act, described above, appeared to have removed the possibility that Federal public land ownership and water development activities could jeopardize water rights based upon State law (*California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142; *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725; *Ickes* v. *Fox*, 300 U. S. 82; and see *Nebraska* v. *Wyoming*, 325 U. S. 589, 611 et seq.).

For years there has been a tendency to treat acts of Congress, which have authorized the acquisition of water rights in the West pursuant to local laws or customs and have sought to effectuate State control, as merely directory and not mandatory. On accasions, Federal ownership and control of all unappropriated waters has been claimed. The result has been an increasing and widespread fear that long-established water rights and policies were in jeopardy.

In view of the recent decision in the so-called Pelton Dam case, *F. P. C.* v. *Oregon* (349 U. S. 435) uncertainties have arisen concerning the future interpretations of the Desert Land Act. Enactment of S. 863 will clarify the situation. Failure to do so will lead to protracted litigation and the possible destruction of local investments in water development.

In the Pelton Dam case the applicant for a license under the Federal Power Act did not acquire water rights for power development under the laws of Oregon, notwithstanding the provisions of section 9 and 27 of that act (41 Stat. 1068, 1077). The proposed power dam would lie between an Indian reservation dating from 1855 on one side and, on the other, a power site reserve first set aside in 1909 and later confirmed under the act of June 25, 1910 (36 Stat. 847), giving the President authority to withdraw public lands for public purposes. The stream was presumed to be nonnavigable. Nevertheless, the Desert Land Act was held inapplicable "to the use of waters on reservations of the United States"—even when the reservation has been created since 1877. The term "reservation" was used to include any public lands withdrawn or reserved from sale or disposition under the public land laws.

There is no valid reason for the Federal Government to attempt to take over the regulation of water rights in the West. That subject is not one requiring interstate uniformity. In fact, the opposite is true. Conditions vary greatly from locality to locality and only State or local control can be effective. Certainly dual Federal-State control systems would be a disaster.

Since 1900, millions of acres have been withdrawn from entry for a variety of purposes. Nearly 140 million acres are in forest reserves alone. Yet it is estimated 4,500 water diversions and canal and reservoir rights-of-way on and over such withdrawals have been permitted in the last 50 years in the Western States. The possible impact of the Pelton decision was pointed out in the dissenting opinion, where Justice Douglas said (349 U. S. at 456):

> I assume that the United States could have recalled its grant of jurisdiction over water rights, savings, of course, all vested rights. But the United States has not expressly done so; and we should not construe any law as achieving that result unless the purpose of Congress is clear.
>
> The reason is that the rule adopted by the Court profoundly affects the economy of many States, 10 of whom are here in protest. In the West, the United States owns a vast amount of land—in some States over 50 percent of all of the land. If by mere Executive action the Federal lands may be reserved and all the water rights appurtenant to them returned to the United States, vast dislocations in the economies of the Western States may follow.

In the light of the Pelton decision it is entirely possible to argue that State law appropriations which have been made on Federal withdrawals are null and void. No one can say with certainty whether the water rights "reserved" to the United States are riparian in character or whether they apply to all future beneficial uses on withdrawn Federal lands, whether or not the lands are riparian. Nor can anyone predict what effect these withdrawals will have on appropriative water rights above and below Federal withdrawals. In effect two entirely different schemes of water law may have been imposed on the same streams, and the previous orderly development of rights to the use of water under State law criteria may be seriously disrupted.

In view of the hundreds of millions of acres in public land withdrawals and reservations, Federal claims may well amount to a perpetual reservation of vast amounts of unappropriated water for use on these lands, whether or not the United States ever puts the water to beneficial use. Such a principle would be a gross waste of the West's limited and most precious resource, water. In this bill, Congress would make it clear that rights to the use of this water acquired under local law will be recognized by the Federal Government.

Another source of concern in the Western States has been the plenary power of the United States under the commerce clause, in dealing with navigable waters, to interfere with water rights vested under State law without paying just compensation. The Supreme Court has ruled that the Reclamation Act of 1902 requires such compensation in constructing and operating reclamation projects (*U. S.* v. *Gerlach*, 329 U. S. 725). Similarly, the Federal Power Act has been held to require such payment by Federal power licensees (*Federal Power Commission* v. *Niagara Mohawk Power Co.*, 347 U. S. 239). Nevertheless, in the absence of such congressional directives, it is clear that there would be no such obligation (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *U. S.* v. *Twin City Power Co.*, 350 U. S. 222). S. 863 will extend the rule now applicable to reclamation projects and Federal power licensees to all Federal activities on navigable waters.

S. 863 will not put the Federal Government out of the reclamation business, and there is no intention to impair the constructive activities of the Bureau of Reclamation. To the contrary, it is well established that Federal reclamation came into its own only under the provisions of the act of 1902, and those provisions, as stated hereinbefore, include in section 8 the same requirements that this bill would impose on all Federal agencies. It is the intention to assist the West in achieving greater development of its resources and continued progress in settlement. This, in turn, will make the Nation stronger and improve our national defense. Congress always has ample legislative power to institute and protect all legitimate activities of the Federal Government. For example, the Supreme Court, in *Arizona* v. *California* (283 U. S. 423, 451), stated emphatically that the United States may perform its functions without conforming to the police regulations of the State. Therefore, if and when specific problems arise in the field of water-resource development which cannot be adjusted cooperatively by the States and the Federal agencies, Congress by specific legislation can intercede and effect the adjustment best

suiting the national interest. This can be done because Congress has tremendous constitutional powers. It can invoke the war and defense powers, the general-welfare clause, and many other specific grants when it deems necessary or desirable. When it does so, its enactments are part of the supreme law of the land under the supremacy clause of the Constitution. Inconsistent prior acts, Federal or State, are always superseded by subsequent laws properly invoking constitutional powers, and one Congress cannot irrevocably bind a future Congress in their exercise. Thus each Congress retains powers adequate to safeguard the national interests.

As a matter of fact, it would be foolhardy to build reclamation projects on the basis of present Federal claims under the Pelton Dam doctrine. If the courts should hold Federal rights to be merely those under traditional riparian law, the Federal Government would be left without rights to divert water out of the watershed or to deplete the flow substantially.

CONSTITUTIONAL BASIS

In enacting S. 863 the congressional power to legislate stems primarily from article IV, section 3, clause 2, of the Constitution, which clearly empowers Congress to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. This power of Congress to dispose of any kind of property belonging to the United States is vested without limitation. In this connection, it must be remembered that Congress not only has a legislative power over the territory and possessions of the United States, but also exercises in connection with the public domain the powers of a proprietor therein. It may deal with public lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. The power thus is entrusted only to Congress and it is not even for the courts to say how that trust shall be administered. That is for Congress to determine (*Alabama* v. *Texas et al.*, 347 U. S. 272).

Under this plenary power, Congress at one time made the State of Tennessee its agent to dispose of all the public lands in that State (5 Stat. 413). It established the Commonwealth of Puerto Rico, and it granted independence to the Philippine Islands. It once established a legislative court to adjust claims in the Mexican cession and it effected early severance of all nonnavigable waters from the public domain in the West for the use of the public, thereby removing the impediment of a possible claim of proprietary interest to the full and successful operation of State and local doctrines of appropriation. Similarly, Congress abandoned jurisdiction over that part of the District of Columbia formerly part of the State of Virginia. (9 Stat. 35.)

In the California Oregon Power Co. case the Supreme Court said (295 U. S., at 162, 163):

> As the owner of the public domain, the Government possessed the power to dispose of land and water thereon together, or to dispose of them separately * * *. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and all nonnavigable waters thereon should be reserved for the use of the public

> under the laws of the States and Territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation * * *. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States * * *.

In referring to the congressional power to do this, the Supreme Court declared:

> If it be conceded that in the absence of Federal legislation the State would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the State, and that it has done so by the legislation to which we have referred, cannot be doubted (*Power Co.* v. *Cement Co.*, *supra*, at 162).

When Congress so provides, it is clear that State laws and regulations governing acquisition of interests in public lands and waters will be enforced by the Supreme Court (*Gutierres* v. *Albuquerque Land Co.*, 188 U. S. 545; *Butte City Water Co.* v. *Baker*, 196 U. S. 119; *Atchison* v. *Peterson*, 87 U. S. 507; *Basey* v. *Gallagher*, 87 U. S. 670; *Jennison* v. *Kirk*, 98 U. S. 453; *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690).

Congress can, if it so desires, exercise many of its constitutional powers to implement or effectuate State laws. It did so in the field of mining law (*Butte City Water Co.* v. *Baker*, 196 U. S. 119). It did so in commerce by enacting the Webb-Kenyon Act and the Ashurst-Summers Act (*Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311; *Kentucky Whip and Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334. See also, *In re Rahrer*, 140 U. S. 545; *Whitfield* v. *Ohio*, 297 U. S. 431). In the former, Congress in effect made interstate shipments of alcoholic liquor subject to State laws. This arrangement was upheld by the Supreme Court, which said that Congress had the power to enact legislation making existing and future State prohibition laws applicable. Congress similarly is proposing in S. 863 to use its constitutional powers to aid the States in securing the full protection of local uses of waters. For this purpose, Congress is bringing into play constitutional powers to make needful rules and regulations respecting its property. As pointed out in the Kentucky Whip and Collar case, Congress if free to recognize fundamental interests and to exercise its powers to avoid harmful consequences of lack of coordinated Federal-State policies.

It was thought that an amendment to the McCarran law relating to the adjudication of water rights in State courts was desirable (66 Stat. 560). However, in view of the opposition of the Department of Justice, which appears to be based largely on policy considerations, it was decided to strike sections 7 and 8 from the bill and leave the law as it now reads. Some explanation is in order, however, with respect to the constitutional basis for this law. Authority of Con-

gress to vest this adjudicatory jurisdiction in the State courts stems from a dispute in the Constitutional Convention. A supreme appellate court was agreed to quite early in the proceedings, but that was a sharp division on the question of establishing a lower Federal court system. The original Randolph plan, in addition to a provision for a supreme tribunal, proposed a system of lower Federal courts. While this proposal was tentatively adopted at the outset, there was strong sentiment in the Convention to leave all litigation at the trial stage to the State courts. This was a principle in the Patterson plan. Mr. Rutledge of South Carolina later moved for reconsideration of that part of the Randolph plan whereby a lower Federal court system tentatively had been accepted. To him and to Sherman of Connecticut, appellate review by the Supreme Court was enough to protect the Federal interest, and Sherman thought that a duplicate Federal trial court system was too expensive. Madison opposed reconsideration, and a deadlock ensued. However, a compromise was reached eventually whereby a motion to eliminate the lower Federal courts carried by a 5 to 4 vote, with 2 States divided. Thereafter Madison and Wilson moved to give Congress the option of establishing lower courts. The final result was article III, section 1 of the Constitution which reads:

> The judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may establish.

This is implemented by article I, section 8, clause 9, which states that Congress shall have power to constitute tribunals inferior to the Supreme Court. It is a matter of history that the Federalists were in control of the national Government in its formative years, and they desired and established a strong Federal system, including a system of lower Federal courts. This does not, however, disparage the power of Congress to exercise its option and vest in the State courts trial jurisdiction. Congress can limit, abolish, or transfer jurisdiction of Federal courts, and it has done so on certain occasions. Thus, there can be no doubt as to the constitutional authority of the Congress to require that certain Federal water rights be adjudicated in State courts.

RECOMMENDATIONS FOR FURTHER STUDIES

Throughout the hearings there were various suggestions for further studies. This was recommended by the Bureau of the Budget, for example. Such studies are neither necessary nor desirable so far as the Western States are concerned. They would merely occasion further delays and uncertainties. President Eisenhower's Presidential Advisory Committee on Water Resources Policy has just completed a study. Prior to that, President Truman's Water Resources Policy Commission made an extensive study. Another study has just been completed by the Intergovernmental Relations Committee. Before that, a subcommittee on the study of the water law of the National Resources Planning Board made an extensive study and submitted a report. There have been other studies and reports such as that of a committee of the National Reclamation Association. All of these reports, in varying degrees, have recognized the need in the West for the implementation of local policies and State laws. There is no reason to believe that further studies would or could produce a better method for dealing with this serious and complex problem.

In this connection it is interesting to note that similar questions and problems are arising in the eastern part of the United States. The State of Maryland is claiming the right to protect its interests on the Potomac River. These Eastern problems, however, require a different solution and that solution must be sought collectively by the States. They should meet and seek to agree upon and establish a water policy which the Congress can recognize and implement as it has done in the West.

As a matter of fact, the recent report of President Eisenhower's Advisory Committee in itself recognizes the very basis for enactment of S. 863, and it is difficult to understand the necessity for a study so far as the Western States are concerned. The report contains the following statements:

> As expansion continued westward, new conditions were encountered to which the doctrine of riparian rights was not suitable. The arid and semiarid climates of the more western States made it necessary to store water supplies to meet domestic, agricultural, and industrial needs during the dry seasons. Western mining was also largely dependent on a continuity of water supply. A rule was evolved to meet local custom and common interest that the one who first applied water for beneficial uses, whether for domestic, agricultural, mining, or manufacturing purposes, was entitled to protection of the right of continued use, whether or not he was a landowner adjacent to the stream.
>
> This custom early ripened into the principle of prior appropriation of rights to use of water by which existing beneficial uses were recognized as constituting a prior right to the water of a stream; that first in time of beneficial use was first in right; and that through its beneficial and productive use valid property rights could be acquired.
>
> The agricultural, mining, and hydroelectric power economy of the 17 Western States is largely built upon the recognition of the right to use water as a property right. Large areas of land in our Western States are admittedly of little value if deprived of water. The right acquired by the appropriation of water has been recognized from the beginning of development of the West as a property right, just as valued and oftentimes more so, and just as much protected by the law as the title to the land itself (H. Doc. 315, 84th Cong., pp. 20–21).

Reports of the Federal departments and agencies on the bill as introduced and amendments thereto are hereinbelow set forth in full:

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D. C., March 15, 1956.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington, D. C.

MY DEAR MR. CHAIRMAN: This is in reply to your letter of March 5, 1956, requesting the views of the Bureau of the Budget on S. 863, a bill to govern the control, appropriation, use, and distribution of

water, and on the amendment to S. 863 proposed by Senator Barrett. The amendment is in the nature of a substitute bill and would be known as the Water Rights Settlement Act of 1956.

Both S. 863 and the amendment proposed would apply only to the States situated wholly or in part west of the 98th meridian. While the bill and the amendment differ substantially in format, their purpose appears to be similar. This purpose is to prohibit any Federal agency or employee from interfering in the 17 Western States "with the exercise of any right to the use of water for beneficial purposes heretofore acquired under and recognized by State custom or law except when expressly authorized by law and upon payment of just compensation therefor * * *." Federal agencies and those proposing to operate under Federal authority would also be required to acquire all rights to the use of water under State law, except for the storage and release of water by the United States solely for the prevention of floods.

The Department of Justice discusses certain legal and constitutional questions with respect to this legislation in considerable detail in its report to your committee. The Bureau believes that these questions should be most carefully considered by the committee.

Apart from any legal and constitutional questions which may be presented, the bills deal with important and complex matters of water resources policy. These matters are discussed in the reports of the various agencies, particularly the Departments of the Interior and Agriculture. In connection with these questions, this Bureau believes that there will be wide support for the declaration of policy in section 2 of the proposed amendment, which reads in pertinent part as follows: "To promote the beneficial application of the available water supplies in these regions it is and has been necessary that public and nonpublic entities be encouraged to make investments in water-resource developments. Security of right to the use of water for beneficial purposes is essential to such encouragement, and regulating the acquisition of water rights must be orderly and with full regard to the need for stability of such rights if public and private investments in water resource development are to continue on a sound basis."

However sympathetic the executive agencies may be to such a declaration of policy by the Congress, the fact remains that serious problems of Federal policy regarding the exercise of water rights, particularly in the arid and semiarid areas of the West, have existed for a long time and there are basic conflicts which must be resolved. Most recently this matter was considered by the President's Advisory Committee on Water Resources Policy. It came to the conclusion that the complexity of the problem required further study under the leadership of the Federal Government, but in collaboration with State and local entities. The Bureau of the Budget believes that such a study is essential to the proper evaluation of legislation along the lines of S. 863. Meanwhile, however, we believe that individual problems should be solved in the light of circumstances peculiar to them. Therefore, the executive agencies will work out solutions to specific situations in cooperation with the States, without prejudice to any broader policy ultimately developed.

In the circumstances, the Bureau of the Budget recommends against the enactment at this time of either S. 863 or the amendment proposed by Senator Barrett.

Sincerely yours,

PERCY RAPPAPORT,
Assistant Director.

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE,
LEGISLATIVE AND PUBLIC AFFAIRS,
Washington, D. C., March 16, 1956.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate.

DEAR MR. CHAIRMAN: This will reply to your request for comments of the Department of Defense on S. 863, a bill to govern the control, appropriation, use and distribution of water. Comments of this Department on S. 863 (amendments), a similar bill to govern the control, appropriation, use, and distribution of water, are being submitted by the means of an accompanying but separate report.

Section 1 of the bill provides that all of the navigable and unnavigable water in certain enumerated Western States are declared free for appropriations under the jurisdiction of the State concerned and that thereafter the control, use, and distribution of such appropriated waters are to be subject to the laws of that State. The effect of this section would be to subject many Government establishments in the States concerned to State law insofar as the control, use, and distribution of water is concerned and to make the operation of such establishments subject to the police powers of the various States. Thus, the application of State law to the use and distribution of water on Federal property lying within a State would be required, resulting in the exercise of control by State administrative officers over the day-to-day use of water on Federal reservations. However, it is difficult to determine the precise scope and effect of the bill.

There is a lack of uniformity of approach by the various States to the problems of water rights, and their statutes vary greatly. The instant bill, therefore, in the event of enactment at this time, could seriously hamper our national defense efforts. To place the internal operation of a military reservation under State water laws would require State approval before taking any action, such as movement of troops, change in water use, or any other action that would alter the rate or location of water use. Such a situation is objectionable as complete Federal control over many of the military establishments is essential in the interest of national defense. Further, such a situation could result in an expensive delay in the procurement of essential water rights and even in a complete denial of such rights.

The Department of Defense recognizes that the problems to which this proposed legislation is directed are many and complex, problems that are of grave and increasing concern to the entire Nation, but particularly to those States west of the 98th meridian. Accordingly, the Department is most anxious to assist and cooperate in the determination of solutions that will result in a sound policy relating to water whereby the needs of the people, national, regional, State, and local, are adequately met. In this connection, the Department of Defense

recommends that a study be made by the Federal Government in collaboration with State and local entities to determine the relationships between property rights to water and the social and economic development of the Nation and the area, as well as the principles and criteria which should be incorporated into Federal, State, and local laws regarding water rights. This is also a recommendation of the Presidential Advisory Committee on Water Resources Policy.

The Department of Defense, in keeping with general policies concerning State requirements, considers that its water rights should be exercised with due regard for State requirements and needs. It accepts the principles which recognize water rights as property rights. The Department will make every reasonable effort to adhere to State and local laws and practices and, when necessary in time of drought and shortages, will voluntarily restrict the use of available waters to the most essential needs. The Department, however, is opposed to any legislation that would interfere with or endanger the national defense effort.

In consideration of the foregoing, the Department of Defense is opposed to the enactment of S. 863.

The Bureau of the Budget has advised that there is no objection to the submission of this report to the Congress.

Sincerely yours,

LORNE KENNEDY,
Deputy, Legislative Affairs.

MARCH 19, 1956.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington, D. C.

MY DEAR MR. CHAIRMAN: This is in response to your request dated March 5, 1956, for the views of the Department of Justice concerning the amendment to be proposed by Senator Barrett to the bill S. 863. Under the proposed amendment, the bill would be entitled "A bill to recognize and confirm the authority of arid and semiarid States relating to the control, appropriation, use, or distribution of water within their geographic boundaries, and for other purposes."

The proposed legislation would be cited as the "Water Rights Settlement Act of 1956." After a detailed recital indicating that the security of prior rights to the use of water acquired under State law for beneficial purposes is threatened by the exercise by the Federal Government of its rights to the use of water in those States lying wholly or in part west of the ninety-eighth meridian, the purpose of the proposed legislation is stated in the last sentence of section 2 as follows: "Because of the fact that previous acts of Congress have been and may be interpreted with respect to these States so as to cast clouds on such prior rights and to interfere with the future orderly development of water resources in accordance with the foregoing declaration, it is the purpose of this act: (1) To remove any such clouds; (2) to provide for the future acquisition of unappropriated waters, navigable and nonnavigable, in compliance with State laws; and (3) to provide adequate protections of the Federal interests to the end that the Federal Government may perform its functions in a manner consistent with the foregoing purposes."

This Department questions the validity of the assumption underlying the statement of policy that Federal activities in the Western States involving rights to the use of water threaten the security of prior rights acquired under State law or cause undue interference with such rights or with the orderly acquisition of such rights in the future. If there are instances in which either public or nonpublic investments in water resource developments have been jeopardized by the National Government in the exercise of its powers and authority under the Constitution, they are indeed rare.

Passing over without further comment the statement of policy considerations, it appears that the effect of the legislation would be to subordinate substantially all Federal rights to the use of water in the West to the laws of the States and the rights of those claiming under State laws and to completely subject the National Government in this field to control and regulation by the States. That this effect is inconsistent with, and, in the present form of the bill, at best renders uncertain of accomplishment, the declared purpose "(3) to provide adequate protections of the Federal interests to the end that the Federal Government may perform its functions in a manner consistent with the foregoing purposes" is apparent from the following considerations.

Section 5 of the proposed legislation would provide that: "In the use of water for any purpose in connection with Federal programs, projects, or activities no Federal agency or employee of the Government shall interfere with the exercise of any right to the use of water for beneficial purposes heretofore acquired under and recognized by State custom or law except when expressly authorized by law and upon payment of just compensation therefor: * * *." The full impact of this provision is difficult of comprehension. Questions of construction would be innumerable. It is conceivable that rights "heretofore" acquired under and recognized by State custom or law without recognition or prior vested rights of the Federal Government not based upon State law would be held superior to the Federal rights. There are presently pending in the courts numerous cases involving that precise situation. A conceivable construction of section 5 is that it constitutes a relinquishment by the United States of America of its vested rights to the use of water in every instance when an appropriator under the laws of the State, asserting a right acquired prior to the date of the approval of the legislation, claims adversely to the rights of the United States irrespective of relative priority. Under such a construction, the executive branch of the Federal Government would be precluded from fulfilling its responsibilities in connection with the development of water resources and the use of those resources if for no other reason than that the costs would be, in many instances, prohibitive. Beyond the question of the extent to which section 5 might conceivably be construed as subordinating reserved or other presently vested rights of the Federal Government not based upon State law to rights asserted under such laws, other impediments to performance by the Federal Government of its functions in water resource devlopment are suggested. For example, the injunction against interference by Federal agencies or employees with the exercise of any right to the use of water heretofore acquired under and recognized by State custom or law might be construed as requiring water deliveries from the Colorado River for the satisfaction of all rights to waters of that river heretofore

acquired under State law without regard to the feasibility of such deliveries unless express authorization for the taking of such rights by the Federal Government can be found in legislation. There is wide conflict between such possible construction of section 5 of the proposed legislation and the claims asserted by the several States included in the lower basin of this river in litigation now pending in the Supreme Court of the United States. A similar impact upon administration by the Federal Government of other great reclamation projects in the West is conceivable.

The devastating effects of the provisions of section 6 of the proposed legislation upon the performance by the Federal Government of its functions in water resource development and in the exercise of its rights to the use of water are even more readily apparent. These provisions, subject to existing rights under State law, purport to reserve for appropriation and use of the public pursuant to State law all navigable and nonnavigable waters, and would require all Federal agencies and all permittees, licensees, and employees of the Federal Government, as a condition precedent to the use of water for any purpose in connection with Federal programs, projects, activities, licenses, or permits, to acquire the right to such use in conformity with State laws and procedures. The only exception to such requirement of conformity with State law relates to the storage and release of water solely for the prevention of floods.

The impracticability, if not the impossibility, of full compliance by the Federal Government with State laws in connection with interstate stream development is obvious. This applies not only to reclamation projects but as well to the use of water for power development, improvement and control of navigation, flood control beyond the mere storage and release of water, pollution control, and other proper functions of the Federal Government in connection with the water resources of the Nation. That the necessity of complying with the varying and oftentimes conflicting provisions of the laws of the several States affected by any interstate stream project before such project might be undertaken seriously threatens the possibility of additional Federal projects on such streams appears clear.

This Department cannot, of course, state with certainty the interpretations which may be placed by the courts upon the proposed legislation. The best that can be done is through an analysis of the legislation to suggest what interpretations are reasonably conceivable. In this connection, it is conceivable that the provision of section 6 reserving for appropriation and use of the public pursuant to State law all navigable and nonnavigable waters might be construed as opening up for appropriation under State law the waters stored in Hoover Dam, Parker Dam, Davis Dam, Friant, Shasta, Grand Coulee, Elephant Butte, Fort Peck, Oahe, Garrison, Fort Randall, and other similar projects without regard to the purpose of the project and without regard to the authorizing legislation, existing Federal contracts, or other considerations.

Other equally undesirable consequences are perceivable through the interpretations which might be made of section 6. There is nothing in the proposed legislation which saves from the operation of that section present rights of the United States, with the exception of the provision of section 9 relative to the fulfillment of treaty obligations. The language of section 6 seems to require that in the future no

Federal right to the use of water which is not already based upon State law may be exercised unless a right to such use is first acquired in conformity with State law relating to the control, appropriation, use or distribution of such waters. Whether rights to the use of water for many purposes which are recognized as being within the purview of the Federal Government can be acquired in conformity with State laws presents a serious question. The subject bill provides that rights to the use of navigable and nonnavigable waters "for beneficial purposes" shall be acquired under States laws relating to the appropriation, control, use or distribution of such waters. Use for a beneficial purpose is a prerequisite to acquisition of a water right in those States following the system of prior appropriation. By definition what constitutes a beneficial purpose in a particular State would depend upon the law of that State. Many Federal uses are not recognized as being for beneficial purposes under present laws of all the Western States and many are not so recognized under present laws of any of those States. In this category are navigation, recreation purposes, conservation of fish and wildlife, maintenance of national parks, monuments, and scenic attractions, military purposes, and others. If a right to the use of water for any of such purposes could not be acquired in conformity with State law, the provisions of section 6 of the subject legislation would in effect constitute a prohibition against the continuance of existing and the initiation of future Federal activities within these areas, except as such prohibition may be held violative of constitutional provisions. It could be argued that Federal law recognizing the validity of such purposes in the field of Federal activity would have to be accepted as part of the State law relating to the control, appropriation, use or distribution of water. Past experience indicates that this view would not be willingly accepted. The last proviso in section 6 does not preserve to the National Government the right to the use of water in the national parks and monuments. It merely prohibits others from acquiring the right to store or divert waters therein.

Beyond the question of the impossibility of acquiring rights under State law for many proper Federal purposes, reference is also made to the impracticability in numerous other situations of acquiring all necessary water rights in conformity with State law prior to proceeding with Federal projects. Attention is also directed to the fact that the bill would in effect delegate to State authorities control over the operation of all Federal "programs, projects, activities" requiring the exercise of rights to the use of water. Passing for the time the constitutional aspects of such a delegation, it is suggested that the infeasibility of turning over to authority other than the executive branch of the Federal Government the control of projects built at a cost of hundreds of millions of dollars contributed by the taxpayers of the entire Nation requires no further comment.

That the provisions of section 6 appear to expose to loss, through appropriation by others under State law, all presently vested rights of the United States to the use of water on the Government's military establishments, national forests, Indian reservations, national parks and monuments, and other reserved lands, except as the fulfillment of treaty obligations in connection therewith is involved, should be noted. Even if it were assumed that all affected Federal agencies would proceed immediately to attempt to perfect in conformity with

State law the presently vested rights which would be so exposed, little imagination is required to envisage the flood of conflicting claims as to dates of priority which would ensue.

In the next preceding paragraph, an immediate attempt by all affected Federal agencies to perfect in conformity with State law rights presently vested in connection with reserved lands is assumed. If such attempts were not successfully consummated prior to the acquisition of rights by others in those waters which are now reserved by the National Government, or if filings already made thus become effective, liabilities of still another nature might be involved. For example, there are the rights of the Indians and Indian tribes to the use of water on their reservations which are not based on State law. If, as above suggested, such prior rights were lost as the result of the operation of section 6, an obligation to compensate the Indians in a very large amount might well be established. Although section 9 of the proposed bill would appear to eliminate from this particular consideration the Indian rights with respect to reservations established by treaty, there is nothing in the bill which saves the Indian rights stemming from executive action or otherwise.

Section 7 of the proposed bill is a waiver of immunity from suit which is broader than title 43 United States Code, section 666. The latter permits the joinder tof the United States as a defendant "in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights * * *." Section 7 (a) of the proposed legislation would permit the joinder of the United States as a defendant "in any suit relating to the control, appropriation, use, or distribution of water which is to be used for beneficial purposes * * *." Although this Department would vigorously resist in behalf of the United States such a contention, and there is doubt as to the constitutionality of the law so construed, it is conceivable that section 7 (a) might be construed as authorizing injunctive relief against the United States when it is contended that the directions of the Congress to the executive branch of the Federal Government are not being carried out in conformity with State law. Without regard to the validity of such contentions in any such suit, it is readily discernible that such a construction of section 7 (a) might well result in prolonged delays in the accomplishment of water resource development projects provided for by the Congress pending the outcome of such litigation. There is serious doubt whether the Federal projects, either now operating or authorized throughout the West, could have been possible under the provisions of this bill. The net result of a waiver of immunity from suit such as is here presented could be an abdication by the Congress to the judiciary of those powers relating to water resources which are delegated by the Constitution to the Congress and which that body has in the past jealously guarded.

Numerous problems of conflict between constitutional provisions and the provisions of the subject bill are presented.

One of these has to do with the provision of section 6 that all navigable and nonnavigable waters are reserved for appropriation and use of the public pursuant to State law. In several of the affected States, the common law doctrine of riparian rights is recognized in varying degrees. Is not the congressional purpose to make the law of prior appropriation exclusively applicable in all these States,

without regard to riparian rights, an invasion of the reserved power of the States to control the non-Federal ownership and use of rights to the use of waters within their respective jurisdictions? It is doubtful that the opening language of section 6 making the provisions of the section subject to presently existing rights under States law overcomes this objection.

Another question with reference to the same language in section 6 is whether the Congress has the power, in the face of the commerce clause of the Constitution of the United States, to reserve for appropriation under State law all navigable waters in the western two-thirds of the Nation.

Brief reference has been made above to the effect which sections 5 and 6 would have of delegating to State control the administration and management of Federal projects and activities. It is further noted that these provisions would in effect delegate to State control those rights to the use of water which under existing law are property rights owned by the United States of America. It is believed that such delegation by the Congress to the States of the power to make "all needful rules and regulations respecting" those property rights of the Federal Government would be in contravention of article IV, section 3, clause 2 of the Constitution of the United States. It is also believed that for Congress to attempt to take from the executive branch of the Federal Government and invest in State authorities the power to make rules and regulations for or affecting control of the Federal properties involved in "Federal programs, projects, activities", including federally owned rights to the use of the water, would be in violation of fundamental precepts of constitutional law respecting the separation of powers. For under article II, sections 1 and 3, of the Constitution, the President is charged to take care that "the laws be faithfully executed * * *." Faithful execution by the President (through the executive departments and agencies) of all the laws of Congress relating to water resources in conformity to the laws of 17 different States would, it is submitted, be patently impossible. But in addition, the Congress is prohibited from assuming to itself executive functions. A fortiori it may not invest those functions in the States and their agencies over which it has not control. To bestow upon the States the powers of the President to "take care that the laws" relating to rights to the use of water are faithfully executed is contrary to the proposition that Congress can neither delegate its own powers nor enlarge those of a State.

A conflict between the purpose of the proposed legislation to make State laws relating to the use of water superior to all Federal law in that field and the provisions of article VI, clause 2 of the Constitution is also suggested.

For the foregoing reasons, the Department of Justice is opposed to the enactment of the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

90004°—57 S. Rept., 84-2, vol. 4——123

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., March 20, 1956.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.

MY DEAR SENATOR MURRAY: This letter is in response to your request for a report on amendments contained in committee print dated August 17, 1955, and intended to be proposed to S. 863, a bill to govern the control, appropriation, use, and distribution of water.

Subject to consideration of the comments herein set forth, this Department favors the objectives of this proposed legislation.

Section 1 of the proposed substitute bill would designate the proposed legislation as the "Water Rights Settlement Act of 1956." It is noted that its provisions would apply only to those States lying wholly or partly west of the 98th meridian. Hence, we suggest that the designation should read "Western Water Rights Settlement Act of 1956."

A brief summary of the unique growth of water law in the Western States should be helpful in appraising the merit of the proposed substitute bill.

Water law in the eastern States is, for the most part, based upon the common law doctrine of riparian rights. Under these principles rights to use flowing waters are appurtenant to the ownership of riparian lands, and each such owner has an obligation to return water used to the stream, substantially undiminished in quality or quantity, for the benefit of downstream riparians. As against the rights of others, riparians may not use water on nonriparian lands. Furthermore, upper riparians do not lose their rights through nonuse even though downstream riparians may have put the water to beneficial use for many years. These results were satisfactory at a time when and in a humid region where water could be assumed plentiful for all human needs.

All of the States to which the proposed bill would apply are totally or partially arid or semiarid. The land areas of these States vastly outstrip the available water supply. Consequently, the adoption of water law principles by these States was and is a matter of fundamental importance to their development. Control over the use of water in those States can be a matter of life and death to whole communities, and, in the interests of sound public policy, rights to the use of water must be as free from uncertainty as our legal institutions can make them.

The history of western water law commenced with the discovery of gold on public lands in the 19th century. These lands at that time were not open to occupation and settlement under Federal law, yet settlers went into these areas and established local rules and regulations to provide a reasonable degree of peace and order. Even before Federal recognition of these rules and customs, State and Territorial legislatures and courts enforced and implemented them.

Because of the arid nature of the region it was frequently necessary to divert water from streams and lakes for use in the mining localities. Under local laws and customs water rights were based upon appropriation of water, priority in time, and beneficial use. In some States, such as California, the principle of prior appropriation was super-

imposed on the riparian system. In others, such as Wyoming and Colorado, prior appropriation was adopted as the exclusive principle of water law. In Colorado and Utah water has been declared to be the "property of the public" (Colorado Constitution, art. XVI, sec. 5; Utah Code Annotated, sec. 73–1–1). The Wyoming Constitution declares water to be the "property of the State" (Wyoming Constitution, art. 8, sec. 1).

Since the United States, through cession, was the owner of the vast public lands in these Western States and Territories, its potential claims, riparian or otherwise, to water rights as appurtenances to its land ownership constituted a definite hazard to the rights of early settlers who had diverted water, conducted it long distances, and put it to beneficial use for mining and agricultural purposes. Desiring to promote the development of the West the Congress enacted a series of acts opening lands to settlement for mining and agricultural purposes. By the act of July 26, 1866 (14 Stat. 251) the Congress confirmed water rights which had accrued by priority of possession and "are recognized and acknowledged by local customs, laws, and the decisions of courts * * *." These possessory rights were further protected by the act of July 9, 1870 (16 Stat. 217) which provided that public land patents "shall be subject to any vested and accrued water rights". (See *Atchison* v. *Peterson*, 87 U. S. 507; *Basey* v. *Gallagher*, 87 U. S. 670; *Jennison* v. *Kirk*, 98 U. S. 453; *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142.)

These statutes were followed by the Desert Land Act of 1877 (19 Stat. 377) which allowed the entry and reclamation through irrigation of desert lands in a western area which now includes the States of California, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, North and South Dakota (Colorado was added later). This act contains a proviso that an entryman's right to use water would depend upon prior appropriation for irrigation and that:

"* * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights" (43 U. S. C. 321).

The Reclamation Act of 1902 (32 Stat. 388) provided the basis for direct action by the Federal Government in the construction and operation of irrigation projects. From the very beginning Congress declared that this program must be carried out in conformity with State water law. Section 8 of that act provides:

"SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State, or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

As other Federal programs for resource management have come into existence a number of provisions have been enacted, varying in scope and detail, which were manifestly designed to avoid conflict between Federal activities and local water law principles. Among these are the following:

(1) Act of June 4, 1897 (30 Stat. 36), relating to forest reservations.

(2) Sections 9 (b) and 27 of the Federal Power Act of 1920 (41 Stat. 1068, 1077).

(3) Section 3 of the Taylor Grazing Act of 1934 (48 Stat. 1270).

(4) Sections 3 (b) and 10 of the Water Conservation Act of August 11, 1939, as amended by the act of October 14, 1940 (54 Stat. 1121, 1125).

(5) Section 1 of the Flood Control Act of February 22, 1944 (58 Stat. 887).

(6) The National Parks Act of August 7, 1946 (60 Stat. 885).

(7) Section 208 of the act of July 10, 1952 (66 Stat. 560).

(8) Section 3 (e) of the Submerged Lands Act of May 22, 1953 (67 Stat. 31).

(9) Section 4 of the act of August 4, 1954 (68 Stat. 667).

(10) Section 4 (b) of the act of July 23, 1955 (69 Stat. 368).

Under these statutes, which are built on the principle of comity between the Federal and State governments in regulating the acquisition of rights to the use of water, thriving communities have been established in States once described as the "Great American Desert." Today approximately 27 million acres are irrigated. Of this total about 7 million are the result of Federal projects, and the rest have been subjected to irrigation through local efforts based upon presumed security of property rights to the use of water.

At least with respect to nonnavigable waters, this presumed security of right so necessary to encourage local water development—seemed well founded. Federal legislation, particularly the Desert Land Act, described above, appeared to have removed the possibility that Federal public land ownership and water development activities could jeopardize these water rights based upon State law (*California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142; *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725; *Ickes* v. *Fox*, 300 U. S. 82; and see *Nebraska* v. *Wyoming*, 325 U. S. 589, 611 et seq.).

In the California Oregon Power Co. case the Supreme Court said (295 U. S., at 162–3):

"As the owner of the public domain, the Government possessed the power to dispose of land and water thereon together, or to dispose of them separately * * *. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and all nonnavigable waters thereon should be reserved for the use of the public under the laws of the States and Territories named. The words that the water of all sources of water supply upon the public lands and not navigable 'shall remain and be held free for the appropriation and use of the public' are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation * * *. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States * * *."

In view of the recent decision in the so-called Pelton Dam case (*F. P. C.* v. *Oregon*, 349 U. S. 435), uncertainties have arisen concerning the future interpretations of the Desert Land Act. In our judgment this situation should be clarified. Failure to do so, we believe, will lead to protracted litigation, the possible destruction of local investments in water development, and the imposition on the Federal Government of substantially all the burden of future water development in the West.

In the Pelton Dam case the applicant for a license under the Federal Power Act did not acquire water rights for power development under the laws of Oregon, notwithstanding the provisions of sections 9 and 27 of that act (41 Stat. 1068, 1077). The proposed power dam would lie between an Indian reservation dating from 1855 on one side and, on the other, a power site reserve first set aside in 1909 and later confirmed under the act of June 25, 1910 (36 Stat. 847), giving the President authority to withdraw public lands for public purposes. The stream was presumed to be nonnavigable. Nevertheless, the Desert Land Act was held inapplicable "to the use of waters on reservations of the United States"—even when the reservation has been created since 1877. The term "reservation" was used in its broadest sense to include any public lands withdrawn or reserved from sale or disposition under the public-land laws.

Since 1900, millions of acres have been withdrawn from entry for a variety of purposes. Yet many water diversions and canal and reservoir rights-of-way on and over such withdrawals have been permitted in the last 50 years in the Western States, subject to compliance with State law. The possible impact of the Pelton decision was pointed out in the dissenting opinion, where Justice Douglas said (349 U. S., at 456):

"I assume that the United States could have recalled its grant of jurisdiction over water rights, saving, of course, all vested rights. But the United States has not expressly done so; and we should not construe any law as achieving that result unless the purpose of Congress is clear.

"The reason is that the rule adopted by the Court profoundly affects the economy of many States, 10 of whom are here in protest. In the West, the United States owns a vast amount of land—in some States, over 50 percent of all of the land. If by mere Executive action the Federal lands may be reserved and all the water rights appurtenant to them returned to the United States, vast dislocations in the economies of the Western States may follow."

In the light of the Pelton decision it is entirely possible to argue that State law appropriations which were made on Federal withdrawals many years ago are null and void. No one can say with certainty whether the water rights "reserved" to the United States are riparian in character or whether they apply to all future beneficial uses on withdrawn Federal lands, whether or not the lands are riparian. Nor can anyone predict what effect these withdrawals will have on appropriative water rights above and below Federal withdrawals. In effect two entirely different schemes of water law may have been imposed on the same streams, and the previous orderly development of rights to the use of water under State law criteria may be seriously disrupted.

The importance of recognizing water rights as property rights was pointed out by the Report of the Presidential Advisory Committee on Water Resources Policy, where it was said:

"There has not been adequate consideration given to the proper respective relationships and responsibilities between the Federal Government and the States and private individuals with reference to water resources rights. It is believed that the principles which recognize water rights as property rights should be accepted. Determinations as to disposition of water should recognize such rights. A study should be made by the Federal Government in cooperation with State and local bodies to develop principles concerning water rights that would assure the most effective use of water to best meet the needs of the people—national, regional, State, and local" (H. Doc. 315, 84th Cong., p. 3).

In addition to the above general observations, we submit the following specific comments concerning the proposed substitute to S. 863:

Section 5 requires all Federal agencies and employees to avoid interference with water rights acquired under State law in the 17 Western States prior to the effective date of the proposed legislation, unless that interference "is expressly authorized by law and upon payment of just compensation." The usual exceptions are provided for acquisition by purchase, exchange, gift, or condemnation. This language does not attempt to delegate or limit constitutional powers of the Federal Government and merely requires, in the exercise of those powers, application of the principle of just compensation to all cases of water rights vested under State law. However, since the phrase "expressly authorized by law" might be construed to require a detailed specification of water rights to be acquired in Federal project legislation—and this is seldom feasible at the time of authorization—we recommend deletion of the word "expressly" from this section. We also recommend that the words "eminent domain" be substituted for "condemnation" in the proviso.

Section 6 would expand the provisions of the Desert Land Act so as to apply to both navigable and nonnavigable waters in the affected States. It would, so far as the Federal Government is concerned, also make such waters available for appropriation for beneficial purposes, pursuant to State law, without the public lands limitations of the Desert Land Act. All Federal agencies, employees, permittees, and licensees would be required hereafter to acquire water rights in conformity with State law. This latter provision is nearly identical to section 8 of the Reclamation Act of 1902, which now governs the Secretary of the Interior.

The first proviso to section 6, recognizing the historical and public policy considerations in flood-control operations, excepts storage and release of water by the United States solely for the prevention of floods. The second proviso contains the usual exception for authorized acquisitions by purchase, exchange, gift, or condemnation. The third proviso preserves to the United States any defense it may have against the assertion of a water right which otherwise would be enforcible only because of a State statute discriminating against the United States. The last proviso makes clear that nothing in the bill is to be construed as permitting the acquisition of any private right to divert or store waters in any national park or monument.

We recommend that the saving clause for existing rights at the beginning of section 6 be expanded to cover such rights, if any, under Federal law as well. Constitutional difficulties may thus be avoided. To accomplish this end the words "under State law" should be deleted. This would also preserve Indian water rights.

We recommend the substitution of the words "eminent domain" for "condemnation" in the second proviso.

The basic purpose of the bill, so far as water rights acquired previously are concerned, appears to be in the nature of quiet title legislation. We are unaware of any State legislation which, through discrimination against the United States, has permitted the creation of water rights interfering with Federal activities. To avoid unnecessary litigation we believe that the third proviso should be limited to rights "hereafter acquired under State law."

Section 7 is principally concerned with reenacting, in substance, the provisions of section 208 of the act of July 10, 1952 (66 Stat. 560). Subsection (b) clarifies the process requirements of the above-mentioned section 208. Subsection (d) makes explicit the right of the United States to remove water actions in State courts to Federal courts. Since the subject matter of section 7 concerns matters of judicial procedure within the jurisdiction of the Department of Justice, we refrain from making any recommendations with respect thereto.

Section 8 reserves the defense of sovereign immunity in actions in the Supreme Court relating to the rights of States to the use of waters of any interstate stream.

Section 9 is a saving clause to assure that the bill is not construed to permit appropriations of water in any State in excess of that State's equitable apportionment under judicial decree or interstate compact, or when such appropriation would interfere with the fulfillment of treaty obligations.

As you know the President's Advisory Committee on Water Resources Policy recently recommended the initiation of a joint Federal-State study of desirable improvements in Federal and State laws relating to water rights. I believe it would be fully appropriate for this committee to initiate legislation toward this end.

We recommend careful consideration of the reports submitted to your committee by other agencies and believe that additional amendments may be desirable in order to avoid any serious problems of construction. Representatives of this Department will stand ready to cooperate with your committee toward this end.

We are advised that the Bureau of the Budget has no objection to the submission of this report. However, your attention is called to the adverse report on S. 863 submitted by that agency on March 15, 1956.

Sincerely yours,

DOUGLAS MCKAY,
Secretary of the Interior.

DEPARTMENT OF AGRICULTURE,
Washington, D. C., June 8, 1956.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate.

DEAR SENATOR MURRAY: This is in reply to your letter of May 31, 1956, requesting our comments on Committee Print No. 4 of amendments (to amendments) to the bill S. 863 "to govern the control, appropriation, use, and distribution of water" reported by the subcommittee on Irrigation and Reclamation to the Committee on Interior and Insular Affairs for consideration on Tuesday, June 12, 1956.

We have reviewed the provisions of the Committee Print No. 4. We consider the problem dealt with by the bill to be one of policy for determination by the Congress. This Department would have no objection to the passage of the bill as reflected in Committee Print No. 4.

The position of the Department, expressed in our comments of March 21, 1956, on an earlier version of the bill, is that it has traditionally favored full recognition by the Federal Government of the authority of the States relating to the control, appropriation, use, or distribution of beneficially used water within their boundaries. The Department also believes that all Federal water resources activities should honor fully all concerned water rights acquired under State laws. It has required appropriate conformance with the provisions of such State laws in the administration of its various programs and activities.

The Bureau of the Budget advises that there is no objection to the submission of this report.

Sincerely yours,

TRUE D. MORSE,
Acting Secretary.

FEDERAL POWER COMMISSION,
June 8, 1956.

FEDERAL POWER COMMISSION REPORT ON COMMITTEE PRINT NO. 4, AMENDMENTS TO AMENDMENTS OF S. 863, 84TH CONGRESS, A BILL TO RECOGNIZE AND CONFIRM THE AUTHORITY OF ARID AND SEMI-ARID STATES RELATING TO THE CONTROL, APPROPRIATION, USE, OR DISTRIBUTION OF WATER WITHIN THEIR GEOGRAPHIC BOUNDARIES, AND FOR OTHER PURPOSES

The proposed amendments to the bill S. 863, as contained in the Committee Print No. 4 of June 12, 1956, are in the nature of a substitute bill and would be known as the Western Water Rights Settlement Act of 1956. The amendments contained in this committee print, particularly section 9, make it clear that the principal effect of the bill would be to place Federal reservations under State control to the extent that their utilization is dependent on the use of unappropriated water flowing through or past such reservations.

As stated in the Commission's report on the proposed amendments to S. 863, (submitted Jan. 27, 1956, and printed at p. 5 of the com-

mittee hearings on S. 863) the bill involves essentially a policy question for congressional determination. Accordingly, the Commission made no recommendation as to its enactment, but believes that if the effectiveness of the licensing provisions of the Federal Power Act is to continue in the future as it has for the past 35 years the bill should be further amended to expressly state that it will not apply or be construed as applying to any provisions of the Federal Power Act.

FEDERAL POWER COMMISSION,
By JEROME K. KUYKENDALL,
Chairman.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D. C., June 11, 1956.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington, D. C.

MY DEAR MR. CHAIRMAN: This is in reply to your letter of June 1, 1956, requesting the views of the Bureau of the Budget on Committee Print No. 4 of amendments to S. 863. The amended bill would be entitled "Western Water Rights Settlement Act of 1956."

While Committee Print No. 4 of amendments to S. 863 represents an improvement over the earlier version of the bill, it does not appear to overcome the legal and constitutional questions raised by the Department of Justice in its report of March 19, 1956, on the earlier version of amendments to S. 863. As indicated in our previous letter of March 15, 1956, we believe that these questions require careful consideration. We also believe that, in view of the complex nature of the problems of Federal policy regarding the exercise of water rights, it is still essential that a study of Federal, State, and local relations with respect to water rights be undertaken along the lines recommended by the Advisory Committee on Water Resources Policy, before legislation on this subject is enacted.

For these reasons, the Bureau of the Budget recommends against enactment at this time of Committee Print No. 4 of amendments to S. 863.

Sincerely yours,

ROBERT E. MERRIAM,
Assistant to the Director.

JUNE 11, 1956.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington. D. C.

DEAR MR. CHAIRMAN: This will refer to your letter of May 31, 1956, requesting the comments of the Department of Justice with respect to Committee Print No. 4 of amendments to S. 863, "Western Water Rights Settlement Act of 1956."

Various objections and questions with respect to this bill were expressed in the report of this Department dated March 19, 1956. In the main, those objections and questions were directed at the apparent purpose of the bill to subject the Federal Government to

control by the States in all uses of water, without regard to the fact that, independently of State law, the United States may own as a property right the right to such use or may have the power under the Constitution to control such use.

The amendments and modifications indicated in Committee Print No. 4 of the bill do materially reduce some of the doubts indicated in the previous report. On the other hand, some of the objections previously expressed continue to be fully applicable and some of the modifications proposed raise additional problems.

With respect to section 5, it is thought that the phrase "any right to the use of water for beneficial purposes theretofore acquired under and recognized by State custom or law" should be construed by the courts as taking into account the fact that State custom and law include the rights and powers of the Federal Government under the Constitution of the United States, and the treaties and laws made in pursuance thereof. Construed in this manner "any right to the use of water * * * acquired under and recognized by State custom or law" will be subject to any prior right of the United States under the law. The exercise of such prior right would not be deemed any interference with a right which is subject to it. Since the constitutionality of this section if construed otherwise would be subject to serious doubt, it is felt that the objections previously raised need not be pressed at this time so far as this section is concerned.

It is suggested that the statement "recognized under State law" appearing at the end of section 5 should be clarified by adding a comma after the words "eminent domain." This would remove the threat of litigation based on any serious claim that the United States had to act under State eminent domain laws.

By elimination of the words "under State law," from the first line and inclusion of the word "unappropriated," in the second line of section 6, the first sentence of that section has been greatly improved, so as to protect vested rights. There remains the question we raised previously, as to the effect of a congressional declaration that the law of prior appropriation shall apply in areas where the laws of a State do not so provide.

This bill now provides for appropriation of all unappropriated waters. What effect that will have on water rights in California and other Western States that now recognize riparian rights in some measure, we are unable to predict. But beyond that the bill now provides for appropriation of underground waters. Some western State water codes have no provisions covering ground waters. What effect will this bill have on present users in such States? The effect of such coverage can only be determined after an examination State by State and use by use to see what changes this causes.

Assuming that the words "as a condition precedent to the use of any such water," from the second sentence of section 6 (line 12, p. 5, Committee Print No. 4) were stricken by the committee so as to make the provision directory, constitutional questions are not raised. If it is intended that the United States shall be required to ask the States for rights it has, assuming that ownership, the constitutional questions remain.

It is thought that the proviso beginning on line 22, page 5, Committee Print No. 4, should be applicable regardless of when the discriminatory right may have been acquired. It is, therefore, suggested that the word "hereafter" appearing in line 22, page 5, be stricken.

Rights of the United States to water under interstate compacts and judicial decrees should be protected equally with rights of the States thereunder. It is suggested that this would be accomplished by insertion of the words "or the United States" following the word "State" in line 3, page 8, Committee Print No. 4.

It is suggested that the purpose sought to be accomplished by the inclusion of Federal reclamation projects at the end of section 7, page 8, Committee Print No. 4, would be more fully accomplished if the word "authorized" were substituted for the word "constructed."

The words "of others" in the first line of section 8, page 8, Committee Print No. 4, should be stricken. The language in this section saving existing rights would then be identical with the language of section 6.

Section 9 is a new section which may have substantial adverse effect on the withdrawals and reservations made by the Executive largely by congressional authorization to protect and preserve the natural resources of the country for the benefit of the public. Although the national parks and monuments are to some extent protected, if the water rights are taken away from other reservations, many of them which need the water for the use intended by the withdrawal would be indirectly destroyed. The extent of this effect could only be determined by careful examination of each reservation and the water necessary to its use and development for the intended purpose.

If the reservations are not desirable we would respectfully suggest that it would be safer to pass legislation directly restoring such properties to the public domain.

The Department of Justice believes that legislation such as S. 863 is not the answer to the fundamental clashes that occur between the Federal and State governments on occasion regarding the use of water, under our constitutional system. We are of the opinion that, as the Reclamation Association said: "* * * the solution lies largely in the integration of the operation of physical facilities and the coordination in an appropriate manner of jurisdictions in a dual form of government."

Should the Congress consider it feasible, we would respectfully suggest that legislation implementing the water resources committees, at regional or river-basin level and study under the leadership of the Federal Government in collaboration with State and local entities, as recommended in the Water Resources Report of December 22, 1955 (H. Doc. 315, 84th Cong., 2d sess.), be authorized at this time. Such an approach to these questions could be expected to furnish a fundamental solution to these basic problems without the risk of doing injury to the conservation, reclamation, and development programs for the West, possible in this bill and yet not intended or even anticipated by anyone in or out of the Congress.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

DEPARTMENT OF THE ARMY,
Washington, D. C., June 19, 1956.

HON. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to Committee Print No. 4 of amendments to S. 863 (amendments), a bill to recognize and confirm the authority of arid and semiarid States relating to the control, appropriation, use, or distribution of water within their geographic boundaries, and for other purposes. The Secretary of Defense has delegated to the Department of the Army the responsibility for expressing the views of the Department of Defense thereon.

The general purpose of Committee Print No. 4 is the same as S. 863 (amendments), which was the subject of a Department of Defense report dated March 16, 1956. The committee print under consideration deletes provisions relating to waiver of immunity of the United States from suit and interstate litigation (secs. 7 and 8 of S. 863 (amendments)). It adds provisions concerning the use for navigation of waters (sec. 8); withdrawals and reservations of public lands (sec. 9); construction with the Reclamation Act of 1902 (sec. 10); and separability of provisions (sec. 11).

Section 8, proposed for addition to the bill, would provide that the use for navigation of waters arising in States lying wholly or partly west of the 98th meridian shall be only such use as does not conflict with any beneficial use, present or future, in States lying wholly or partly west of the 98th meridian of waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Since 1944, the operation and maintenance of works authorized in each River and Harbor and Flood Control Act have been subjected to the following provision in section 1 (b) of the Flood Control Act of December 22, 1944, and the River and Harbor Act of March 2, 1945:

"The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the 98th meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the 98th meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

It will be noted that the policy proposed in section 8 would modify this 1944 policy by (*a*) making it permanent general legislation, applicable to the operation and maintenance of works heretofore and hereafter constructed and (*b*) extending it to the use of waters even where no Federal works are constructed.

Rather than enact a provision of law of such broad scope the far-reaching effects of which are difficult to foretell, it is believed preferable to continue the present practice whereby Congress, in considering the authorization of works involving the use of waters for navigation, can at the same time consider whether this provision for avoiding conflict with beneficial use should be applied with respect to the particular projects to be considered at that time.

Section 9 purports to subject any agency of the Department of Defense which utilizes any reserved or withdrawn public land to State control of the water rights on such lands. The Department of Defense is opposed to this section because its enactment may result in undue interference with the performance of the military duties of the Department. This possibility exists because section 9 could have the following consequences:

(*a*) State administrative officers would exercise a day-to-day control over the use of waiver by agencies of the Department of Defense.

(*b*) The national defense efforts would be complicated by the lack of uniformity of approach to the water rights problem by the various States. Furthermore, there are undoubtedly many problems, some of which may now be foreseeable and others which may not, which might arise as State laws are modified or new State laws enacted.

(*c*) Military decisions, such as those relating to the movement or disposition of troops, would be restricted by State control of water rights on military reservations.

The omission in Committee Print No. 4 of provisions relating to waiver by the United States of immunity from suit and interstate litigation and the addition thereto of sections 10 and 11 concerning construction with the Reclamation Act of 1902, and separability of provisions involve questions of law. With respect to such matters the Department of the Army, on behalf of the Department of Defense, defers to the views of the Department of Justice.

In view of the general similarity of purpose of Committee Print No. 4 to S. 863 (amendments), the Department of the Army on behalf of the Department of Defense reaffirms the position of the Department of Defense on this legislation as expressed in its report dated March 16, 1956. This position was discussed with your committee by representatives of the Department of Defense during hearings on S. 863 (amendments) on March 21, 1956, and further explained by letter dated April 12, 1956, addressed to the chairman, Committee on Interior and Insular Affairs, from George H. Roderick, Assistant Secretary of the Army (Civil-Military Affairs).

This report has been coordinated with the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

Inasmuch as the committee has requested that the report be expedited, it is submitted without a determination by the Bureau of the Budget as to whether or not it conforms to the program of the President. As soon as such advice is received it will be forwarded to your committee.

Sincerely yours,

WILBER M. BRUCKER,
Secretary of the Army.

FEDERAL POWER COMMISSION,
June 21, 1956.

FEDERAL POWER COMMISSION REPORT ON COMMITTEE PRINT OF PROPOSED AMENDMENTS TO S. 863, 84TH CONGRESS, A BILL TO RECOGNIZE AND CONFIRM THE AUTHORITY OF ARID AND SEMIARID STATES RELATING TO THE CONTROL, APPROPRIATION, USE, OR DISTRIBUTION OF WATER WITHIN THEIR GEOGRAPHIC BOUNDARIES, AND FOR OTHER PURPOSES

The proposed amendments to the bill S. 863, as contained in the Committee print of August 17, 1955, are in the nature of a substitute and would be known as the Water Rights Settlement Act of 1956. The bill, as amended, would prohibit Federal agencies from interfering with the exercise of existing water rights acquired under and recognized by State custom or law, and would require Federal agencies and those proposing to operate under Federal authority to acquire water rights under State law.

Existing water rights lawfully acquired under State law are recognized in section 5 of the amended bill in substantially the same manner that they are recognized in section 27 of the Federal Power Act. The Power Act provides for the issuance of licenses for the construction of hydroelectric plants by non-Federal interests on lands and waters subject to the jurisdiction of Congress and for the purpose of utilizing surplus water or water power from a Government dam.

Under neither section 5 of the amended bill nor under section 27 of the Federal Power Act can vested water rights be taken without compensation and without compliance with State laws. This is but the continuation of a policy first established by Congress in 1866 to encourage the use of water in the arid and semiarid West by recognizing vested water rights acquired under State law.

Section 6, however, is a departure from past policy and would surrender to the 17 Western States all of the future right of the United States to control, use, license, or permit the use or distribution of navigable and nonnavigable waters within those States. Under section 6 all Federal agencies and permittees, licensees, and employees would be required to conform to State laws before they could use water for any purpose or permit its use by others. All navigable and nonnavigable water is reserved in section 6 by the United States for appropriation and use of the public pursuant to the State laws. There is an express saving of the right of the United States to store and release water for the prevention of floods, but otherwise the United States is placed on a parity with any other entity or person in the acquisition of water rights under State law.

To the extent that the amended bill is drawn upon the principle that the United States may reserve water on streams or lands over which it has ownership or control, it is a proper recognition of the authority of Congress under the commerce clause and the property clause of the Constitution to control commerce and the waters which affect or make commerce possible and to use and dispose of Federal property, lands, and waters, as Congress may find to be in the public interest. Since these are constitutional powers, it is doubtful, as an incidental matter, that one Congress could deprive a succeeding Congress of its authority to exercise these powers. But whether the provisions of section 6 should be enacted is, of course, a question of

policy for Congress and not for the Federal Power Commission and the Commission makes no recommendations thereon, although the following comments appear pertinent.

The only aspect of the bill which would relate to those uses for which the Federal Power Commission has been given responsibilities by Congress concerns the use of water by licensees for the development of hydroelectric power when the water is subject to the jurisdiction of Congress. Under the Federal Power Act these licenses, as the Supreme Court has pointed out, can only be issued for projects which conform to national plans of development wherein the broad public interests are safeguarded and recognition is given to the needs of commerce, flood control, waterpower development, and other beneficial public uses, including recreational purposes.

The licensing provisions of the Federal Power Act, as the Supreme Court has said, are "the outgrowth of a widely supported effort of the conservationists to secure the enactment of a complete scheme of national regulation which would permit the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the Federal power to do so, instead of the piecemeal, restrictive, negative approach of the river and harbor acts and other Federal laws previously enacted." The detailed provisions of the Power Act, the Court said, leave no room or need for conflicting State controls (*First Iowa Cooperative* v. *Federal Power Commission*, 328 U. S. 152, 180 (1946). See also *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 404, 405 (1940)).

By giving certain States an absolute veto power over licenses for hydroelectric projects within their boundaries, the bill would render nugatory the licensing scheme of the Federal Power Act which has been effective for the past 35 years. This is not to say that there are not proper spheres of control which may and should be exercised by the respective States, for the Federal Power Act already gives recognition to the desirability for integrated rather than duplicating Federal and State controls. Section 27 of the act protects vested rights acquired under State law for the control, appropriation, use, or distribution of water in irrigation or for municipal or other uses of the same nature. And there are other State laws with which a licensee must comply and for which the Commission may call for a showing under section 9 (b) of the Federal Power Act, as stated in *First Iowa Cooperative* v. *Federal Power Commission*, *supra*, at page 180. Also, as the Supreme Court has held, licensees are required to conform to State proprietary laws in addition to securing a license under the Federal Power Act before they can lawfully use the waters of even navigable streams. *Federal Power Commission* v. *Niagara Mohawk Power Co.* (347 U. S. 239 (1954)). But these matters under State control cannot stop the construction of a licensed project nor give the States a veto power as would be permitted under the amended bill.

In a decision last June in the case of *Federal Power Commission* v. *Oregon* (349 U. S. 345), the Supreme Court applied the principle of Federal supremacy which it had many times previously stated and it held a Federal Power Act license valid notwithstanding the failure of the power company to secure authority from the State of Oregon, although the only basis of Federal jurisdiction asserted over the waters was the ownership of lands by the United States. The Supreme Court said that this proprietary interest of the United States included a right to use or dispose of the unappropriated waters of a nonnavigable

stream flowing across reserved Government lands. No vested water rights were involved, for they are protected by the provisions of section 27 of the Federal Power Act to which we have referred. Nevertheless, section 6 of the amended bill would require State authorization before a Federal Power Commission license could be utilized in a situation similar to any of the situations in which the above decisions were made.

It may be that the principal objective of the bill is to place water use at Federal military, naval, and civil installations under State control, for the provisions of the bill appear to be so drawn. But if it is not intended to severely restrict the effectiveness of the licensing provisions of the Federal Power Act, the bill should be further amended to expressly state that it will not apply or be construed as applying to any provisions of the Federal Power Act. Since this is essentially a policy question for Congress, however, no recommendation is submitted by the Commission as to the passage of the bill.

FEDERAL POWER COMMISSION,
By JEROME K. KUYKENDALL, *Chairman.*

DEPARTMENT OF THE ARMY,
Washington, D. C., June 22, 1956.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to a certain amendment proposed by Senator Neuberger to S. 863 (amendments), a bill to recognize and confirm the authority of arid and semiarid States relating to the control, appropriation, use, or distribution of water within their geographic boundaries, and for other purposes. The Secretary of Defense has delegated to the Department of the Army the responsibility for expressing the views of the Department of Defense thereon.

The purpose of the proposed amendment is to add a new section 11 which would suspend any license or permit issued under the Federal Power Act for the construction of any project works which would impound or divert the flow of any water if construction has not, on the date of enactment of the bill, reached a stage of completion which effects such impounding or diversion. The Federal Power Commission could terminate the suspension upon a determination by the Commission that all requirements of the bill had been complied with.

"This proposed amendment primarily affects responsibilities within the jurisdiction of the Federal Power Commission. Accordingly, this Department expresses no opinion as to the advisability of the amendment."

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

Inasmuch as the committee has requested that the report be expedited, it is submitted without a determination by the Bureau of the Budget as to whether or not it conforms to the program of the President. As soon as such advice is received it will be forwarded to your committee.

Sincerely yours,

WILBER M. BRUCKER,
Secretary of the Army.

APPENDIX

Provisions of the Constitution of the United States

Article I, section 8 (commerce clause):

"The Congress shall have Power * * * To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."

Article I, section 10 (compact clause):

"No State shall, without the consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign Power * * *."

Article IV, section 3 (property clause):

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States;"

Article VI (supremacy clause):

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Provisions of Federal Statutes in Recognition of State Law as Governing Water Rights

1. The act of July 26, 1866 (14 Stat. 253):

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. R. S. § 2339" (30 U. S. C. A. § 51).

2. The act of July 9, 1870 (16 Stat. 218):

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and

90004°—57 S. Rept., 84-2, vol. 4——124

canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section. (R. S. §§ 2339, 2340.)" (43 U. S. C. A. § 661.)

3. The Desert Land Act of March 3, 1877 (19 Stat. 377):

"It shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of 25 cents per acre—to file a declaration under oath with the register (and the receiver) of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of 3 years thereafter: *Provided, however*, That the right to the use of water by the person so conducting the same, on or to any tract of desert land of 320 acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of 3 years after filing said declaration, upon making satisfactory proof to the register (and receiver) of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding 320 acres to any 1 person, a patent for the same shall be issued to him: *Provided*, That no person shall be permitted to enter more than 1 tract of land and not to exceed 320 acres which shall be in compact form (Mar. 3, 1877, c. 107, sec. 1, 19 Stat. 377; Mar. 3, 1891, c. 561, sec. 2, 26 Stat. 1096)," (43 U. S. C. A. § 321).

4. Section 8 of the Reclamation Act of 1902 (32 Stat. 390):

"Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof (June 17, 1902, c. 1093, sec. 8, 32 Stat. 390)," (43 U. S. C. A. 383).

5. Sections 9 (b) and 27 of the Federal Power Act of 1920 (41 Stat. 1077):

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter" (16 U. S. C. A. sec. 802 (b)).

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein (June 10, 1920, c. 285, sec. 27, 41 Stat. 1077)," (16 U. S. C. A. sec. 821).

6. Section 18 of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057):

"Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement."

7. Section 3 of the Taylor Grazing Act of 1934 (48 Stat. 1269):

"*Provided further*, That nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law" (43 U. S. C. A. 315b).

8. The Great Plains Water Conservation and Utilization Projects Act of October 14, 1940 (54 Stat. 1119):

"As a condition to extending benefits under sections 590r–590x of this title to any lands not owned or controlled by the United States or any of its agencies, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of sections 590r–590x of this title, require—

"(1) The enactment of State and local laws providing for soil conserving land uses and practices, and the storage, conservation, and equitable utilization of waters;

"(2) Agreements or covenants in regard to the maintenance and permanent use of such water, facilities, or lands benefited by such facilities;

"(3) Contributions in money, services, materials, or otherwise to any operations conferring such benefits (Aug. 28, 1937, c. 870, sec. 4, 50 Stat. 870)," (16 U. S. C. A. sec. 590u).

9. The Water Conservation Act of 1939 (53 Stat. 1419):

"(2) the Secretary has found (i) that water rights adequate for the purposes of the project have been acquired with titles and at prices satisfactory to him, or have been initiated and can be perfected in conformity with State law and any applicable interstate agreements and in a manner satisfactory to him; and (ii) that such water rights can be utilized for the purposes of the project in conformity with State law and any applicable interstate agreements and in a manner

satisfactory to him (Aug. 11, 1939, c. 717, sec. 3, 53 Stat. 1419; Oct. 14, 1940, c. 861, 54 Stat. 1120)" (16 U. S. C. A. sec. 590z–1 (b) (2)).

10. Section 1 of the Flood Control Act of December 22, 1944 (58 Stat. 887):

"In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

"In conformity with this policy:

"(a) Plans, proposals, or reports of the Chief of Engineers, Department of the Army, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or in part are concerned with the use or control of waters arising west of the 97th meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph shall be with the governor of the State or such official or agency of the State as the governor may designate. The term 'affected State or States' shall include those in which the works or any part thereof are proposed to be located; those which in whole or in part are both within the drainage basin involved and situated in a State lying wholly or in part west of the 98th meridian; and such of those which are east of the 98th meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case

the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the 97th meridian, to the Secretary of the Interior. Within 90 days from the date of receipt of said proposed report, the written views, and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of the Army shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of the Army may prepare and make said transmittal any time following said 90-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

"(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the 98th meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the 98th meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

"(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of the Army, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of the Army. In the event a submission of views and recommendations, made by an affected State or by the Secretary of the Army pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior the proposed works shall not be deemed authorized except upon approval by an act of Congress; and section 485h of title 43 and section 590z–1 of title 16 are amended accordingly (Dec. 22, 1944, ch. 665, sec. 1, 58 Stat. 887, amended July 26, 1947, ch. 343, sec. 205 (a), 61 Stat 501)" (33 U. S. C. A. 701–1).

11. Reservation (c) to the Mexican Water Treaty, United States Treaty Serial No. 994 (59 Stat. 1219 (1945)):

"(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States."

12. The National Parks Act of 1946 (60 Stat. 885):

"Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts, including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments" (16 U. S. C. A., sec. 17j–2 (g)).

13. Section 208 of the act of July 10, 1952, authorizing suits against the United States in State courts for the adjudication of water rights (66 Stat. 560):

"Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit" (43 U. S. C. A., sec. 666 (a)).

"Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream" (43 U. S. C. A., sec. 666 (c)).

14. Subsection 3 (e) of the Submerged Lands Act of May 22, 1953 (67 Stat. 31):

"Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the 98th meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use and distribution of such waters shall continue to be in accordance with the laws of such States (May 22, 1953, ch. 65, title II, sec. 3, 67 Stat. 30)" (43 U. S. C. A., sec. 1311 (e)).

15. Subsection 3 (c) of the act of July 28, 1954, to authorize the Secretary of the Interior to construct facilities for the Santa Margarita River project, California (68 Stat. 577):

"For the purposes of this Act the basis, measure, and limit of all rights of the United States of America pertaining to the use of water shall be the laws of the State of California: *Provided*, that nothing in this Act shall be construed as a grant or a relinquishment by the United States of America of any of its rights to the use of water which it acquired according to the laws of the State of California either as a result of its acquisition of the lands comprising Camp Joseph H. Pendleton and adjoining naval installations, and the rights to the use of water as a part of said acquisition, or through actual use or prescription or both since the date of that acquisition, if any, or to create any legal obligation to store any water in De Luz Reservoir, to the use of which it has such rights, or to require the division under this Act of water to which it has such rights."

16. The act of July 23, 1955 (being sec. 4 (b) of Public Law 167, 84th Cong.), the act providing for multiple use of the surface of tracts of public land (69 Stat. 368).

"*Provided further*, That nothing in sections 601, 603, and 611–615 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim" (30 U. S. C. A., sec. 612 (b)).

INDIVIDUAL VIEWS OF SENATOR RICHARD L. NEUBERGER ON S. 863

The subject matter of S. 863—the relationship of State and Federal law and authority governing the use of water in the Western States—has become a matter of concern in Oregon largely because of a series of recent instances of Federal Power Commission licenses for projects which have met widespread opposition within the State. Of these, the Pelton project of the Portland General Electric Co. on the Deschutes River most clearly and directly raised the issue of the effectiveness of a Federal Power Commission license to override the legal requirements and prohibitions of State laws designed to effectuate State policies in the use of water resources. The Pelton license went to the United States Supreme Court on appeal of the State of Oregon, and the Supreme Court's decision to uphold the license over the objections of the State has been widely cited in support of the necessity for enacting legislation such as S. 863.

DIFFERENT BILL INTRODUCED BY OREGON SENATORS

S. 863 was not my choice as the best way to deal with the Supreme Court's Pelton Dam decision. That extremely complex opinion dealt with a river which is conceded to be nonnavigable as well as wholly intrastate, and it seemed to rest the result on the narrow question of the status under the Federal Power Act of Indian reservations and power reservations on the Federal public domain. In my view this interpretation of the Federal Power Act could best be dealt with by an amendment to that act, and I therefore introduced S. 3250, cosponsored by my senior colleague, Senator Morse, to provide:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 7 of the Federal Power Act is amended by inserting "(a)" after "SEC. 27" and by inserting at the end of the section the following new subsection:
>
> "(b) In any case where a license is required under the provisions of this Act because the project, or a part thereof, for which such license is required is to be constructed upon lands of the United States, any reservation or classification of such lands shall not affect the applicability or nonapplicability of the laws of any State, relating to the control, appropriation, use, diversion, or distribution of water to the applicant seeking the license."
>
> SEC. 2. Pending any future proceedings in accordance with law as amended by section 1 of this Act, the license granted by the Federal Power Commission to Portland General Electric Company to construct, operate, and maintain a hydroelectric plant, known as Pelton Project Numbered 2030, in and along the Deschutes River in Oregon, is revoked.

The committee, however, has preferred to proceed with the broader approach exemplified by S. 863. I therefore offered what has become known as the "Neuberger amendment" to S. 863, which is now section 11 of the bill. This section provides:

> "SEC. 11. Any license or permit issued under the Federal Power Act for the construction of any project works (as defined in such Act), which would impound or divert or interrupt the flow of nonnavigable and intrastate waters, is hereby suspended if such construction has not on the date of enactment of this Act reached a stage of completion which effects such impounding, diversion, or interruption. Any suspension under the provisions of this Act may be terminated by the Federal Power Commission upon a determination by the Commission that all requirements of this Act have been substantially complied with by the licensee or permittee whose license or permit is suspended."
>
> On page 9, line 3, strike out "SEC. 11" and insert in lieu thereof "SEC. 12".

It seems apparent that every reason of logic and fairness to the State of Oregon supports the inclusion of this amendment in S. 863. The legal situation of the apparent impotence of the State of Oregon to control the use of the Deschutes—a wholly intrastate, nonnavigable stream—in the face of the FPC's license, is also exactly the situation at which S. 863 is directed. Presumably, if S. 863 means anything, it would have the effect in the future of requiring a licensee for a project such as Pelton Dam to obtain water rights under the applicable State laws in this instance to satisfy the State government that its project was consistent with preservation of the important fish resource of the river.

OREGON STATE AGENCIES SOUGHT TO PROTECT FISH RUNS

The Pelton project is controversial because it is believed that it would block off and impair the famous run of steelhead trout which spawn in the Deschutes River, making this river one of the most celebrated fishing streams in the West. It is for this reason that the responsible State agencies have resisted construction of the project, and that its construction is opposed by sports fishermen and other conservationists in the Pacific Northwest.

It is pertinent to emphasize that the Oregon State Fish and Game Commissions, with wide experience in the field of resource conservation, do not believe that Portland General Electric Co. has yet evolved a program which will protect adequately the fish runs of the Deschutes River. Furthermore, it is relevant to note that it was a predecessor of this same utility company which erected power projects across the Clackamas River, likewise in Oregon, thereby doing great damage to important spring runs of migratory Chinook salmon. Because of the damage already done to anadromous fish pilgrimages in the Clackamas River in this selfish action, many residents of Oregon are reluctant to permit the same company to wreak havoc on the fish runs of another great Oregon stream.

OREGON GOVERNOR HAS FAVORED LETTING PELTON PROJECT PROCEED

I think, in fairness, that this report must show that my amendment does not enjoy the support of the present Governor of Oregon. Although under the preceding State administration, the State carried its legal case to its ultimate adverse conclusion in the Supreme Court, the present Governor has stated that he favors S. 863 but not its applicability to the Portland General Electric Co.'s Pelton Dam license on Oregon's Deschutes River. In this, his position approximates that of the company itself, which is also prepared to accept S. 863, as long as it does not apply to its own project—the litigation of which has furnished the chief impetus for the bill.

Governor Smith, however, has always been an advocate of damming the Deschutes River. He was a cosponsor, in the Oregon State Senate in 1953, of a bill to take responsibility for State policy in this field from the Oregon Game and Fish Commissions, which have opposed the Pelton project. This bill failed three times to be enacted.

AMENDMENT REQUIRES ONLY COMPLIANCE WITH S. 863 ITSELF

I repeat that fairness and logic support the inclusion of my amendment. This amendment would only suspend certain outstanding FPC licenses—not revoke them. It applies only to unbuilt projects. It would make applicable to these only the provisions of S. 863 itself—nothing beyond this bill. Reinstatement of a suspended license by the FPC could occur rapidly upon a showing of compliance with S. 863.

This means that the only projects potentially adversely affected by my proposed amendments are projects which have not obtained water rights under State law, which cannot obtain water rights under State law, and which have not yet been built. This is exactly the class of projects which S. 863 is supposed to bring within reach of State law. If the policy of S. 863 is deemed to be sound and necessary, there can be no reason to refuse to apply it to existing licenses which meet these conditions, and which, at least in Oregon, are the reason why proposals for new Federal water legislation have widespread public interest. To exclude such controversial licenses would, in fact, make a mockery of S. 863 as far as the people of Oregon are concerned.

I can speak, therefore, on behalf of the majority of men and women in Oregon in expressing appreciation for the action of the majority of the Committee on Interior and Insular Affairs in including section 11 in S. 863.

RICHARD L. NEUBERGER.

○

Calendar No. 2631

84TH CONGRESS
2d Session

SENATE

REPORT
No. 2588

CONVEYANCE OF CERTAIN LAND OF THE UNITED STATES TO THE STATE OF INDIANA

JULY 17 (legislative day, JULY 16).—Ordered to be printed

Mr. JENNER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 9810]

The Committee on the Judiciary, to which was referred the bill (H. R. 9810) to provide for the conveyance of certain land of the United States to the State of Indiana, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

AMENDMENTS

On page one, in line 10, after the word "fair" insert the word "appraised".

On page one, in line 11, after the words "Attorney General" insert the words "upon an independent appraisal".

PURPOSE OF AMENDMENTS

The purpose of the amendments is to provide that the value of the real property be determined upon an independent appraisal.

PURPOSE

The purpose of the proposed legislation, as amended, is to provide for the conveyance of approximately 6 acres of land of the United States in Vigo County, Ind., to the State of Indiana, upon the payment by the State of the fair market value of the property as determined upon an independent appraisal.

STATEMENT

It appears from a report by the Department of Justice, which is printed in full below, upon a similar Senate bill, S. 3408, introduced by Senator Capehart, that the land which is proposed to be conveyed was formerly a part of the Vigo ordinance plant, near Vigo, Ind., acquired by the Department of Defense, and which was transferred in 1950 to the Attorney General by the General Services Administration for use in connection with the United States Penitentiary at Terre Haute, Ind.

The State of Indiana desires the property which is proposed to be conveyed for the construction and maintenance on it of a State police barracks.

The Department of Justice advises that such use of the property by the State of Indiana would not interfere and would be consistent with the Government's use of adjoining property, and the Department is in accord with the enactment of the proposed legislation.

The Department of Justice recommended that the bill, as introduced, be amended (1) to provide for the reversion of the property to the United States if it should be used for any purpose other than for a State police barracks or other use which in the opinion of the Attorney General is incompatible with the use of the adjoining premises by the United States for a penal institution; (2) to reserve to the United States all minerals, including gas and oil in the property to be conveyed; (3) to provide that the fair market value of the property to be conveyed should reflect the value of the reservations and rights to reversion included in the proposed legislation; (4) to provide that the transfer of the property include highway rights-of-way; and (5) to make the description of the land to be conveyed consistent with a description in a recent land survey. These amendments have been included in the proposed legislation as it passed the House of Representatives on May 21, 1956.

The committee believes that the proposed legislation, as amended, is meritorious, and recommends it favorably.

Attached and made a part of this report is a letter, dated May 7, 1956, on a similar Senate bill, S. 3408.

UNITED STATES DEPARTMENT OF JUSTICE,
Washington, D. C., May 7, 1956.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 3408) to provide for the conveyance of certain land of the United States to the State of Indiana.

The bill would authorize and direct the Attorney General to convey to the State of Indiana all right, title, and interest of the United States to approximately 6 acres of certain real property located in Vigo County, Ind., upon payment by the State of Indiana of an amount equal to fair market value determined by the Attorney General at the time of conveyance.

The land involved was formerly part of the Vigo ordnance plant, near Vigo, Ind., which was acquired by and was under the jurisdiction of the Defense Department and was transferred in 1950 to the Attorney General by the General Services Administration for use in connection with the United States Penitentiary at Terre Haute, Ind., under authority of Public Law 467, 81st Congress (64 Stat. 36).

The Department of Justice is in accord with the enactment of this bill if amended as hereinafter suggested.

It is understood that the State of Indiana desires the property covered by the bill for the construction and maintenance thereon of a State police barracks. Such use of the property by the State of Indiana would not interfere and would be consistent with the Government's use of adjoining property. However, to avoid the possibility of any other use of the property which might not be consistent with the proper penal administration, appropriate provision should be made in the bill for reversion of the property to the United States in the vent it is not so used. Also, subsequent to the acquisition of this property the United States entered into certain oil and gas leases. Accordingly, provision should be made in the bill reserving to the United States minerals including gas and oil. It is understood that under the existing leases the State of Indiana shares in the revenues received under the leases. Consistent with the above suggestions the bill also should be revised to provide that the fair market value of the property to be conveyed shall reflect the value of the reservations and rights to reversion to be included in the bill.

In line with the foregoing, it is recommended that the bill be amended as hereinafter indicated. On page 2 at line 1 of the bill the period following the word "conveyance" should be changed to a comma and the following language added: "such value to reflect any reservation, exception, restriction or condition to which the conveyance is made subject." On page 2 at line 2 after the period add the following language as a part of section 1 of the bill: "Such conveyance shall reserve to the United States all minerals including gas and oil in the property to be conveyed under this Act, and shall provide that if the property shall ever be used for any purpose other than for a State police barracks or other use which in the opinion of the Attorney General is incompatible with the use of the adjoining premises by the United States for a penal institution, all the right, title, and interest in and to such real property shall revert to and become the property of the United States, which shall have the immediate right of entry thereon."

Consistent with the description in the land survey of this property of February 23, 1956, the bill should be amended by inserting between the semicolon and the word "thence" on page 2 at line 20, the following: "thence right at an angle of 114 degrees and 43 minutes a distance of 563.40 feet;"

Also on page 2 at line 24 of the bill a semicolon should be substituted for the period and the following language added: "and also the property included in the present rights-of-way adjoining the aforesaid described parcel from the center lines of Wabash Road and U. S. Highway No. 41, as intersected by extensions of the west boundary line in a northerly direction, and the south boundary line in an easterly direction." This amendment would provide that transfer of the

property would include the highway rights-of-way the administration and control over which property should be vested in the State.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

O